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Volume II 1944

IN MEMORIAM

SIR WILLIAM S. HOLDSWORTH, K.C., D.C.L., HON. LL.D.,
VINERIAN PROFESSOR OF ENGLISH LAW, UNIVERSITY OF OXFORD.

1871—1944

THE world of legal history and scholarship mourns the recent death of its greatest authority in the field of the development of English juridical institutions. A teaching career which illumined the halls of Oxford and London Universities and the Inns of Court, in London, and inspired students for almost fifty years has ended. But it is a matter of rejoicing that the absorbing ideal, to which he had passionately dedicated his unusual gifts during the whole of his professional career, namely, the writing of the first continuous and complete history of the laws of England, was substantially realized before his pen was laid down forever. This history has been presented in the twelve large volumes already published, and two more, I believe, yet to be published, written since 1938, despite the difficulty of declining health and the great personal bereavement caused by the death in active service of his beloved son, Flight Lieutenant Richard Holdsworth, R.A.F., who was well on his way, prior to the war, to carrying forward the intellectual traditions of his father.

In 1895, Professors Pollock and Maitland published their classical and pioneer two volume work entitled, *The History of English Law, before the Time of Edward I,* stating in their preface:

> "Oftentimes our business has been rather to quarry and hew for some builder of the future than to leave a finished building".

That builder proved to be Dr. Holdsworth, who published the first volume of his monumental legal history in 1903, meriting Maitland's unstinted praise.[1]

The second and third volumes were published in 1909. They evoked the lavish encomia of such celebrated legal scholars as Holmes, who wrote:[2]

> "Mr. Holdsworth is telling us a profoundly interesting story. It is one of the most important chapters in the greatest human document—the tale of what men had most believed and most wanted. It is told with learning and scientific instinct, and the book is to be recommended equally to philosophers who can understand it and to practical students of the law".

From 1909 to 1921, Sir William wrote the history of the English law from 1485 onwards. The twelfth volume appeared in 1938. The colossal significance of Professor Holdsworth's achievement has been thus expressed by Felix Frankfurter:[3]

> "Holdsworth's twelve volumes have not merely added to the knowledge and understanding of law, as it is administered throughout the world, in all the legal systems which are rooted in the Common law as well as where English law, as in South Africa and India, has been grafted upon native institutions. A work like Holdsworth's is not merely a book. It is a process of intellectual re-orientation".

Professor Holdsworth's rank among the great writers of legal history is already certain. His work is as imperishable as that of the first Vinerian Professor at Oxford, Sir William Blackstone. Just as Holdsworth succeeded to the Vinerian Professorship and the picturesque old study in All Souls, overlooking the High Street, used by Blackstone while delivering lectures at Oxford, so too, he has reared an edifice more enduring than granite, which will last as long as American and Anglo-American legal history is studied. Unlike the commentaries of Blackstone, Holdsworth's *magnum opus* is un-

[1] *The Law Quarterly Review*, XIX (1903), 335.

[2] *The Law Quarterly Review*, XXV (1909), 412, 414-15.

[3] Frankfurter, "Professor Sir William Holdsworth 1871-1944," *American Bar Association Journal*, XXX (1944), 81.

marred by the rancor of religious intolerance and the choice of vituperative language when reference is made to things Catholic. It surpasses Blackstone's Commentaries in its greater sensitiveness to the effects produced by the interplay of political and social forces, and in its superior objectivity in the selection and description of historical data.

Roscoe Pound, with his genius for classifying the writings of jurists according to their controlling legal philosophy and dedication to a distinctive School of Jurisprudence, saw in Professor Holdsworth's work an effort to write legal history without recourse to any particular interpretation, such as the political, ethical, or religious, and described the historical jurisprudence of Holdsworth as the history of "unique series", i. e., each cluster of historical events recorded is given as much analytical value as the others. Dr. Holdsworth clearly did not write legal history to vindicate a cause but to organize the enormous wealth of legal material, hitherto unrelated, into a form in which it could be utilized by lawyer, jurist, and legal scholar. His skill subordinated the unobtrusive, normative factors, which determined his selection of facts and the reconstruction of juridical doctrines and principles prior to his photographing them.

Each of the many series of narrated phenomena has been artfully enmeshed in proper degree with determinants of its own sociological, psychological, constitutional, and ethical significance. They have been set into the framework of the centuries, and given a "horizontal" as distinguished from a "vertical" position. In other words, the tendency has been to describe the origin and the growth of many legal institutions in the respective centuries, rather than to relate the continuous evolution of one juristic device through a number of centuries.

Emphasis has been placed upon his *History of English Law,* but in addition to that, Professor Holdsworth is the author of numerous other works. Of these, *An Historical Introduction to the Land Law* (1927), *Some Lessons From*

Our Legal History (1928), and *Some Makers of English Law* (1938) are typical. Scores of articles and papers sprang from his rich scholarship. Without question he was England's greatest academic lawyer.

Sir William is to be remembered, however, not only as an eminent scholar and educator, but also as a man of political action and practical affairs, and an emissary of international good will. He was a member of the Indian States Committee in 1928, and a member of the Ministers Powers Committee, 1930-1932. He was the close personal friend of all the great personages in the English legal world of his time and was often their adviser and counselor.

In 1927, he made an extensive visit to the United States. At that time he received honorary doctoral degrees in law from Northwestern University and the University of Southern California. He gave the dedication address at the opening of the new law school at Northwestern, in 1927. Harvard University honored him during his American visit with the Ames Medal. For many years he has been a regular contributor to American Legal Periodicals. He was an admirer of American life and scholarship.

Dr. Holdsworth's personality and character were as rare and remarkable as his gifts of mind and spirit. To those of us who attended his lectures and were tutored by him, his memory will be unforgettable. Modest, almost shy, he did not think of himself as a great man. He was a congenial companion. He was a large and vigorous man, quick in speech and movement. He was fond of sports. Boating on the Thames, at Oxford, was, no doubt, one of his greatest recreations.

On the title page of each of the twelve volumes of Sir William's History of English law, there appears a quotation from Roger North. It epitomizes in the following simple terms the goal toward which Dr. Holdsworth directed the scholarly energies of a lifetime:

> "To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it stands resolved, yet it is a wonderful accomplishment, and without it, a lawyer cannot be accounted learned in the law".

Truly, Professor Holdsworth, you will ever be accounted learned in the law, the most learned in English law of your generation, if not of all time. Your name is inscribed on the glorious scroll of historic figures whose masterpieces make possible an appreciation of our legal order, a cornerstone of our civilization,—Bracton and Glanville, Coke and Littleton and Blackstone, Maitland and Pollock, ... Holdsworth.

Brendan F. Brown

The Catholic University of America

PRINCIPAL AND SURETY IN CLASSICAL ROMAN LAW

Did action brought against the one consume the obligation of the other? [1]

THE doctrine first presented by F. L. Keller [2] and, until recently, universally accepted answers the question in the affirmative. More exactly speaking, it holds that *litis contestatio* (the joinder of issue) with the *reus* extinguished [3] the obligation of the *fideiussor* (hereinafter called rule 1) and, vice versa, *litis contestatio* with the *fideiussor* destroyed the obligation of the *reus* (rule 2). To account for this result, the dominant opinion assumes that the two obligations were considered as *eadem res*. For *eadem res*—as based on identity with respect to both *causa* and objective of the actions—was, it is established, a requisite for *litis consumptio*, i. e., the reciprocal barring effect of *litis contestatio*.[4]

Lately, however, this doctrine has been called in question, by H. Siber in a short remark,[5] and by W. W. Buckland in an extensive and stimulating discussion.[6] These eminent authors

[1] The following abbreviations are used: Buckland = "Principal and Fideiussor. Consumptio litis," *Juridical Review*, LIII (1941), 281-297; Kunkel = *Römisches Privatrecht* (2nd ed. Berlin, 1935); Siber = *Römisches Privatrecht* (Berlin, 1928); *ZRG* = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (Weimar, 1880 ff.). *Konk.* is used for the present writer's book, *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht* (2 vols., Berlin, 1918-1922).

[2] *Über Litis Contestation und Urteil* (Zürich, 1827), pp. 435 ff., on the basis of the then newly discovered Institutes of Gaius.

[3] Whether *ipso iure* or *per exceptionem*, is not relevant here.

[4] For an elaborate discussion see *Konk.* I, 48-121.

[5] *Op. cit.*, p. 297, n. 12.

[6] Independent of Siber, my old friend Buckland explained his doubts to me as early as in 1929. His interpretation now is available in the article referred to *supra*, n. 1.

deny that there was *eadem res* and regard the accessory nature of *fideiussio* as the only device in point. Since *litis contestatio* with the *reus* ended his original obligation (Gai. III, 180), the purely accessory liability of the *fideiussor* could not survive. "But from the fact that cessation of the principal obligation destroyed the purely accessory one, it does not follow that cessation of the accessory obligation destroyed the principal one." [7] In other words, while rule 1 stands uncontested, rule 2 is rejected as foreign to Roman law.

The supporters of the predominant view have reason to be indebted to Buckland's provocative challenge. Too long have they taken for granted what was merely undisputed. I myself did so when, twenty-six years ago, I tried to detect the causes which made the Romans apply the principle of *eadem res* to the relation of *reus* and *fideiussor*.[8] This, however, is all I can admit. A re-examination seems to show that the time-honored doctrine as such is sound. Here are my reasons.[9]

The natural point of departure and, as commonly recognized, a cardinal text is Justinian's decree of 531, *Cod.* 8, 40, 28. The core of it (pr. and § 1) reads, as follows:

> Generaliter sancimus, quemadmodum in mandatoribus statutum est, ut contestatione contra unum ex his facta alter non liberetur, ita et in fideiussoribus observari. Invenimus enim et in fideiussorum cautionibus plerumque ex pacto huiusmodi causae esse prospectum, et ideo generali lege sancimus nullo modo electione unius ex fideiussoribus vel ipsius rei alterum liberari, vel ipsum reum fideiussoribus vel uno ex his electo liberationem mereri, nisi satisfiat creditori, sed manere ius integrum, donec in solidum ei pecuniae persolvantur vel alio modo satis ei fiat.

[7] Buckland, p. 2.

[8] *Konk.* I, 190 ff.

[9] In order to arrive at precise results, I am going to deal, as Buckland did, solely with *fideiussio*. Passages relating to *sponsio* will only occasionally be referred to. To be sure, *eadem res* between principal and surety might have appeared as more obvious in *sponsio* because a *sponsor* could guarantee only a *verborum obligatio* (Gai. III, 119). The fact, therefore, that Gaius where he registers the differences between *sponsio* and *fideiussio* (III, 118 ff.) is silent on the reciprocity rule might offer another argument for the existence of that rule in *fideiussio*. However, direct evidence for *sponsio* is wanting. There is no chance to get beyond conjectures.

Here, in so many words, the barring effect of *litis contestatio* is abolished between *reus* and *fideiussor* as well as between several *fideiussores* regardless of who was sued first. Moreover, the ensuing § 2 provides the same for *duo rei promittendi*, the old prototype of *eadem res*. The keynote then discussed and repudiated throughout the enactment is reciprocal consumption (*unum—alterum*). Rule 2 is repealed no less emphatically than rule 1. Hence, these conclusions appear to be inescapable: (a) The emperor, in c. 28, cannot have considered the accessory nature of *fideiussio;* he is, in fact, completely silent on it. (b) Rule 2 was valid down to his time.

How far back, however, is it possible to trace this rule? It seems expedient to begin with two passages which have come down to us outside Justinian's compilation.

> *Gai Epitome* (= *GE*), 2,9,2 *i.f.*:Creditor autem, qui pecuniam dedit, in potestate habet ad reddendam pecuniam, quem velit tenere, utrum ipsum debitorem an fideiussorem. Sed si debitorem tenere elegerit, fideiussorem absolvet; si vero fideiussorem tenuerit, debitorem absolvet, quia uno electo, quem idoneum creditor iudicavit, alterum liberat.
>
> *Lex Romana Burgundionum* (= *RB*), 14,7: Gregoriani constitutionibus libro XII sub titulo <de> sponsoribus et fideiussoribus tenetur insertum, quod si quis a debitore suo fideiussorem de solutione acceperit, in potestatem habeat creditor aut fideiussorem tenendi aut eum, qui debitor prius extiterat. Quod tamen ante iudicem creditor profiteri debebit, quem eorum ad solutionem malit tenere.

These texts agree in stating the very rule later disapproved by Justinian, *viz.* either principal or surety is discharged as soon as the creditor "chooses" the other one by bringing action against him. Both texts, of course, are post-classical. So is the language employed and the omission of anything relating to the formulary procedure. From where, however, did the substance of the reported rule originate? *RB* expressly cites the *Codex Gregorianus* as its authority, and there is no reason to distrust the reference.[10] The passage in *GE* while not

[10] P. Krüger, *Collectio librorum iuris anteiustiniani*, III (Berlin, 1890), 240; Brunner, *Deutsche Rechtsgeschichte*, 2nd ed., I (Leipzig, 1906), 506 ff.; Conrat, *Die Entstehung des westgotischen Gaius* (Amsterdam, 1905), p. 48, n. 146; Rotondi, "Studi sulle fonti del Codice Giustinianeo," in *Scritti giuridici* (Pavia, 1922), I, 156, 165 f.

based on the Institutes of Gaius, as we know them, may or may not have been motivated by the same rescript in *Cod. Gregor.*[11] In any event it can be safely assumed that *Cod. Gregor.*, i. e., a compilation made by 300 A. D.,[12] included a provision which, in its substance, was evidently tantamount to the reciprocity rule. In view of this, it is *prima facie* unlikely, if not impossible, that the rule "had grown up in ignorant post-classical times."[13] Diocletian's age is remarkable for its adherence to classical tradition. But even apart from this, where, in his time or at any time thereafter, should that rule have come to life? It was contrary to Greek and Hellenistic law which, due to its concept of suretyship, did not even consider the discharge of the principal by bringing action against the surety.[14] It was contrary to Germanic thought, no matter whether, according to the older theory, liability was solely on the surety[15] or, what seems to be better established, the surety had the principal in his power and was bound to deliver him to the creditor when the debt was due.[16] Hence, neither in Eastern nor in Western legal custom was

[11] The most recent discussion of the origin of the passage is found in Archi, *L'Epitome Gai* (Milan, 1937), pp. 48 ff., 398 ff.

[12] For more precise dates see Rotondi (*supra*, n. 10), I, 131 ff., 146.

[13] Buckland, p. 14.

[14] Controversial is only the question of whether the creditor had his free choice of suing principal or surety. For the affirmative see now Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri* (New York, 1944), pp. 226, 311 ff.; cf. also Pringsheim, "Die archaistische Tendenz Justinians," in *Studi Bonfante* (Milan, 1930), I, 577, n. 159. Qualifications have been proposed by Partsch, *Griechisches Bürgschaftsrecht*, I (Leipzig and Berlin, 1909), p. 190; Mitteis, *Grundzüge und Chrestomathie der Papyruskunde* (Leipzig and Berlin, 1912), I, pp. xi, 267 f., 270 and II, 80; Sethe-Partsch, *Demotische Urkunden zum ägyptischen Bürgschaftsrechte* (Leipzig, 1920), p. 534; San Nicolò, "Zur Nachbürgschaft in den Keilschrifturkunden und in den gräko-ägyptischen Papyri," in *Sitzungsberichte der Bayerischen Akademie der Wissenschaften* (München, 1937), p. 43, n. 2.

[15] See, e. g., von Gierke, *Deutsches Privatrecht*, III (München and Leipzig, 1917), 770 ff.; Huebner, *A History of Germanic Private Law* (Boston, 1918), pp. 475 ff.

[16] Franz Beyerle, "Der Ursprung der Bürgschaft," *ZRG, Germanistische Abteilung*, XLVII (1927), 567 ff., 585 ff., 593 ff.

there room for a non-Roman current suggesting the reciprocity rule. Nor could the rule originate in declining Roman law itself. After the formulary system and the bipartition of court procedure had fallen into disuse, it would have been absurd to attach new consequences in private law to the *litis contestatio,* i. e., to an act which had lost its technical significance and was no longer required to establish a law suit.[17] To be sure, the term is still found in some sporadic texts concerned with the *cognitio*-procedure.[18] But neither was that new *litis contestatio* unequivocal in its meaning nor were its effects as far-reaching and fundamental as those of the classical *litis contestatio.* Most important of all, the idea of a *litis consumptio* (Gai. III, 180) was now obsolete.[19] Only an unappealable judgment precluded a claim from being made the subject of a second suit:

> Posteaquam inter partes fuerit definitum iudicio intercedente negotium, quaecumque actio propter repetendos sumptus vel expensas litis obtenta fuerit, nullam habeat firmitatem, quam iudicati forma non continet: quia quicumque, quod in iudicio adversario praesente non petiit, postea de eadem re litem aliam non poterit incoare,

as it is phrased in the Western *Interpretatio* on *Cod. Th.* 4, 18, 2. Hence, to apply the barring effect of *litis contestatio* to a situation where not even the classical jurists had known it was entirely out of the question. If therefore, as *GE* and *RB* show, action against the *reus* resulted in barring action against the *fideiussor* and *vice versa,* this cannot be explained but by a mere survival of the old tradition. And this survival was subject to qualification. The reciprocity rule, far from being organically rooted in the new procedure, was now simply

[17] Levy, Book review, *ZRG,* XLVI (1926), 367 f.

[18] As to the *litis contestatio* in *cognitio*-procedure see, above all, Steinwenter, "Die Litiskontestation im Libellprozesse," *ZRG,* L (1930), 184 ff. and "Eine kirchliche Quelle des nachklassischen Zivilprozesses," in *Acta Congressus Iuridici Internationalis* (Roma, 1935), II, 141 ff. Cf. also Wenger, *Institutes of the Roman Law of Civil Procedure,* trans. O. H. Fisk (New York, 1940), pp. 287 ff. For Justinian's attitude see Wlassak, *Anklage und Streitbefestigung* (Vienna, 1917), pp. 228 ff.; Steinwenter, *ZRG,* L, 200, 207 ff.; Wenger, p. 288 f.

[19] Wenger, pp. 290, 309 f.

treated as an established maxim of a private law character. Accordingly, while in the classical system the rule was unescapable in any instance of *eadem res,* during the later period it could be set aside by special arrangements of the parties. In fact, it was the frequent occurrence of such arrangements which Justinian (*Cod.* 8, 40, 28) refers to as having prompted his reform.

On the strength of these considerations, the conclusion seems to be amply warranted that the reciprocity rule such as rejected by Justinian, and laid down in both *Cod. Greg.* and *Gai. Epit.,* was familiar to the classical law. It would be gratifying, of course, to have this result borne out by undiluted classical texts. But can we expect those to be extant in the face of the strict directives of *Cod.* 8, 40, 28? If, in the *Corpus iuris,* there is any trace of the rule, it can only be due to inattention on the part of the compilers. And they, it appears, were rather careful in keeping out statements incompatible with the reform. Hence the yield is meagre though not wanting completely.[20]

Whether *Cod.* 5, 57, 1, a rescript of 224, may be used, as it was,[21] as evidence for the reciprocity rule, seems doubtful.[22]

[20] Several passages, not all of them genuine, indicate that a *iusiurandum* sworn by *reus* or by *fideiussor* (Pomp. *Dig.* 12, 2, 42, 1-3; Paul. *Dig.* 12, 2, 28, 1) or a *pactum de non petendo* made with one of them (Paul. *Dig.* 2, 14, 21, 5-27, 1; *eod.* 32; *Dig.* 44, 1, 7, 1; Ulp. *Dig.* 2, 14, 26; cf. also Ulp. *Dig.* 17, 1, 10, 13; *eod.* 12 pr.) might or might not be of avail to the other. That, in particular, such facts could be to the benefit of a *reus,* is stated in Pomp. *Dig.* 12, 2, 42, 1 and Paul. *Dig.* 2, 14, 25, 2. However, these rules are not in point. They were based upon considerations which had nothing to do with *eadem res.* For the *iusiurandum* see *Konk.* I, 102 ff. and Buckland, p. 11 ff. In regard to the *pactum,* Buckland, 9 f. seems to dissent. But its effect, most unlike that of *litis contestatio,* was contingent on the objective pursued by the parties to the pact.

[21] Rotondi, "Appunti sulla stipulatio rem pupilli salvam fore," in *Scritti* (*supra,* n. 10), II, 277 f. (ex 1912); Solazzi, *Istituti tutelari* (Naples, 1929), p. 150 f.; G. Segrè, "In materia di garanzie personali," *Bullettino dell'Istituto di Diritto Romano,* XLII (Rome, 1934), 523 f.

[22] See *Konk.* I, 197, n. 6; Siber, p. 297, n. 12; Buckland, p. 14 f. Besides, the rescript may originally have referred to *sponsores* rather than *fideiussores*: so Solazzi (*supra,* n. 21), p. 148, n. 5, and Buckland.

More to the point, so far as rule 2 is concerned, is a fragment of Ulpian's *disputationes* (*Dig.* 2, 15, 7, 1), if, as suggested by all recent authors,[23] he decided the case in about this manner:

> Si fideiussor conventus et condemnatus fuisset, mox reus transegisset cum eo, cui erat fideiussor condemnatus: an transactio valeat quaeritur: et puto <non> valere, quasi omni causa et adversus reum et adversus fideiussorem dissoluta ...

In fact, without the suggested *non* the passage does not make sense. There is every indication that the compilers cancelled the word[24] because, under the terms of the new enactment, it was no longer correct to say that every cause against the principal was removed by mere action (and judgment)[25] against the surety, i. e., before the creditor was satisfied.

But the codifiers did not direct their efforts against rule 2 alone. Rule 1 did not fare much better. It was eclipsed either by adding the requirement that the debt was paid (*Cod.* 5, 57, 2 [225]; 8, 40, 15 [239])[26] or by suppressing the *exceptio rei in iudicium deductae* (Pomp. *Dig.* 44, 2, 21, 4)[27] or, which makes a sort of counterpart to the *non* cancelled in *Dig.* 2, 15, 7, 1, by inserting a *non* (Proc. *Dig.* 46, 3, 84).[28] The two remaining passages (Scaev. *Dig.* 46, 1, 60; Pap. *Dig.* 15, 1, 50, 2) refer to rule 1 in such a hidden way that, if the compilers

[23] Eisele, "Weitere Studien zum Texte der Digesten," *ZRG*, XXX (1909), 100 ff.; Rotondi, "Di alcune riforme giustinianee relative al pactum de non petendo," in *Scritti*, II, 331, n. 1; Guarneri Citati, *Miscellanea esegetiche*, I (Perugia, 1924), 4 f.; Peterlongo, *La transazione nel diritto romano* (Milan, 1936), pp. 51 ff. Guarneri assumes more far-reaching interpolations.

[24] Rather carelessly, since they failed to adapt sufficiently the rest of the text to the alteration.

[25] In explaining the reference to *condemnatio* the above mentioned authors differ. The extant text is likely to be the result of considerable contraction.

[26] This was already noted by Keller (*supra*, n. 2), p. 437, n. 5, and, with respect to *Cod.* 5, 57, 2, even by Anton Faber.

[27] Eisele, "Exceptio rei iudicatae vel in iudicium deductae," *ZRG*, XXI (1900), 26, 28; Levy, *Konk.* I, 368.—Less certain though likely is the same interpolation in Paul. *Dig.* 44, 1, 7, 1; see also Segrè (*supra*, n. 21), p. 523.

[28] *Konk.* I, 374 f.; Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, IV (Tübingen, 1920), 289; Siber, p. 297; Segrè, p. 522.

found them as we read them now,[29] they may easily have escaped their attention.[30]

Very similar is the condition of the sources in regard to the third and last category dealt with in *Cod.* 8, 40, 28, the *duo rei promittendi.*[31] Again, *litis consumptio* was either expressly rejected (*Cod.* 8, 40, 23)[32] or thoroughly wiped out,[33] except for the one sentence *nec Titio convento Maevius liberatur* (Papin. *Dig.* 45, 1, 116) which, if not overlooked, was allowed to pass because the negative version seemed to make it harmless. This fact is all the more impressive because it evidently contrasts with the manner in which *rei stipulandi* were treated. Not being singled out by the reform decree they are, in a number of texts,[34] still shown as subject to *litis consumptio.* But the manner in which such passages were interpreted now was certainly different from the classical way. The barring effect of *litis contestatio* did not comply with the spirit of contemporary civil procedure for several promisees any more than for several promisors.[35]

In view of all this, the lack of direct evidence for rule 2 in Justinian's law books is only natural. What defies explanation is rather the fact that statements or enactments incorpor-

[29] For *Dig.* 46, 1, 60, see *infra*, p. 19 ff.; for *Dig.* 15, 1, 50, 2, on the one hand, *Konk.* I, 364 ff., on the other, Vážný, "Naturalis obligatio" in *Studi Bonfante* (*supra*, n. 14), IV, 176 f.

[30] Pap. *Dig.* 27, 7, 7 cannot safely be included in this list because, even if it relates to *fideiussores* and not to *sponsores,* it may be a case of "judicial consumption" rather than *litis consumptio*: Levy, *Sponsio, fidepromissio, fideiussio* (Berlin, 1907), p. 148, n. 1.

[31] In the strict sense of this term. But even if the term is understood as applying to any type of contractual debtors, as it does in Papin.(?) *Dig.* 45, 2, 9, pr. (*Konk.* I, 204 ff.), Justinian's method of approach is the same: *Konk.* I, 194-218.

[32] For references see *Konk.* I, 201 f.

[33] Cf. Schulz, "Interpolationen in den Justinianischen Reformgesetzen," *Studi Bonfante,* I, 359; see also the general remarks in *Konk.* II, 16 ff., 22 f.

[34] *Dig.* 45, 2, 2; *eod.* 16; 46, 1, 5 *i.f.*; 46, 2, 31, 1.

[35] Kerr Wylie, *Solidarity and Correality* (Edinburgh, 1923), pp. 229 ff.; see also *Konk.* I, 379, n. 1.

ated in those books do not exhibit the slightest indication that, as Siber and Buckland insist, action against the *fideiussor* failed to release the *reus*. If a rule like this had been the law in classical times, two points seem to be beyond doubt: (a) The classical jurists must have given that rule much consideration in order to contrast it with the converse provision that if issue was joined with the *reus*, the *fideiussor* was immediately discharged. (b) The compilers coming across such a negative proposition should have been most eager to put it in the limelight because it fitted in so perfectly with the scope of the reform decree of 531. Instead, there is complete silence, and what the reform decree refers to is all the other way: *ipsum reum fideiussoribus vel uno ex his electo liberationem mereri.*

Equally silent are the sources about another implication of the opinion opposed here. If, as that opinion holds, *consumptio litis* had worked only one way, a creditor, unless he took the solvency of the *reus* for granted, would evidently have sued the *fideiussor* first in order to avoid the risk he ran when suing the *reus*.[36] A common practice would have developed amounting to the very opposite of what was later made mandatory by *Nov.* 4 with its *beneficium excussionis.* Again, our texts, including *Nov.* 4 pr.,[37] do not show any sign of such a custom. They display a great number, perhaps even a majority,[38] of instances in which action was brought against the principal, and such a procedure was even discussed in cases where the principal was only liable *de peculio,* while the *fideiussor* would have had to pay the whole (Proc. *Dig.* 46, 3, 84; Afr. *Dig.* 46, 3, 38, 2; Pomp. *Dig.* 44, 2, 21, 4). Emperors of the third century, down to Diocletian, still felt induced to re-

[36] So, expressly, Siber, p. 297 f.

[37] More recent remarks on the mysterious statute referred to in *Nov.* 4 pr. are found in Pringsheim, *op. cit.* (*supra,* n. 14), 576 f. and Schulz, "Nachklassische Quaestionen in den justinianischen Reformgesetzen des Codex Iustinianus," *ZRG,* L (1930), 213, n. 1; see also Buckland, p. 14.

[38] This is the view held by Segrè (*supra,* n. 21), p. 529.

ject the assumption [39] that a creditor, as a rule, was bound to sue the principal (*Cod.* 8, 40, 2; *eod.* 2; 3; 19).[40] Gai. *Dig.* 47, 10, 19 is not entirely to the point; it reveals that a creditor suing the *fideiussor,*[41] although the *reus* was ready and willing to pay, might be liable to the *reus* in an *actio iniuriarum.* But this action lay only where the creditor intended an insult against the *reus.*[42]

There remains another objection to the dominant view. Both Siber and Buckland, to support their denial that in classical law *litis contestatio* with the *fideiussor* barred action against the *reus,* assert that such a rule would have been "unbearable in practice" or "eminently unpractical".[43] This censure does not seem to consider sufficiently the difficulty of applying a modern yardstick to a typically Roman device. As part of a modern system, rule 2 would certainly be held unsatisfactory.[44] But rule 1, it should be noted, would by no means be less objectionable. To us it looks rather strange, indeed, to have a creditor lose his surety (or sureties) at the very moment he brings action against a principal who fails to pay voluntarily. Neither would we approve of a rule releasing one of two principal debtors *in solidum* as soon as the other was sued. In Roman Law, however, all these rules stand or fall together. For the classical period they stand because the quasi-novatory effect of *litis contestatio,* which is

[39] Which was even entertained by imperial *procuratores: reum principalem convenire iusserunt* (*Cod.* 8, 40, 3, pr. [208]).

[40] These rescripts are addressed to Romans. The same ruling as handed down to a Greek is found in *Cod.* 8, 40, 5 (214). For the interpolations in this rescript and in *Cod. eod.* 19 see Biondi, *Iudicia bonae fidei* (Palermo, 1920), p. 16.

[41] There is no objection to applying that fragment (at least, also) to *fideiussores*; cf. Levy, *Sponsio* (*supra,* n. 30), p. 42, n. 1.

[42] See also Buckland, *Textbook of Roman Law,* 2nd ed. (Cambridge, 1932), p. 451, n. 6; cf. Rotondi, *Scritti* (*supra,* n. 21), II, 288, n. 1; Lanfranchi, *Il diritto nei retori romani* (Milan, 1938), p. 346 f.

[43] Siber, p. 297, n. 12; Buckland, pp. 5, 14.

[44] Notwithstanding the fact that the principal while released from the creditor normally remained liable to the surety.

their common denominator, was as firmly established as it is foreign to modern thought. The reasoning of Siber and Buckland, therefore, goes far beyond what it is supposed to prove. In reality, it questions not merely rule 2, but the whole principle of procedural consumption. Since that principle is neither contestable nor contested, such criticism is bound to fail.

If classical jurisprudence or practice had found fault with the novatory effect of *litis contestatio,* they would not have hesitated to suggest remedies. Instead, they made *litis contestatio* the pivotal point even outside the boundaries of *eadem res*—where, not subject to the old mechanism of civil consumption, they would have been entirely free to hold liable, until the creditor was satisfied, any debtor not sued. When a "judicial consumption" was practiced with respect to two actions, whether against the same defendant or against several debtors, the *iudex,* on the mere ground that *litis contestatio* was performed on one action, dismissed the other or he rendered *condemnatio* contingent upon the plaintiff's waiver of the other action. In the same way, a "praetorian consumption" used to proceed by means of the praetor's refusal to permit a *litis contestatio* on *actio* (b) after a *litis contestatio* on *actio* (a) had taken place.[45]

Returning to principal and surety, the same basic view is in evidence. To be sure, there were creditors not willing to put up with the risk implied in *litis consumptio,* and there were devices they might use to escape the risk. A *mandatum credendae pecuniae* or a *mandatum agendi*[46] worked in this direction, and the *promissio indemnitatis*[47] was invented for the very purpose of thwarting *litis consumptio.* But none of these transactions became the regular mode of establishing a suretyship, none of them came to replace *fideiussio* or even to reduce the role it played as the central institution. And

[45] *Konk.* II, 10, 115.

[46] See Paul. *Dig.* 17, 1, 45, 8; also *Inst.* 3, 26, 2.

[47] Levy, *Sponsio,* p. 147 ff.

this occurred although, in moulding creditor-debtor relations, the interests of the creditors used to play as vital a part as they do today. Moreover, why, after all, were the actions against principal and surety considered as being *de eadem re?* If this was the case in the old *sponsio,* it did not have to be the same with *fideiussio,* unless it was so desired. Introduced at an advanced stage of Roman jurisprudence, *fideiussio* was avowedly created to do away with what was inconvenient in *sponsio.* The road then was wide open to evade *litis consumptio* and hold both principal and surety liable until the obligation was performed. It would have been easy enough for the jurists to stress the absence of *eadem causa* in its usual meaning [48] and thus to infer the lack of *eadem res.* If they did not take this course or any other to avoid *eadem res,* they must have been satisfied with the result.

The supporters of the dissenting opinion do not deny that *litis contestatio* with the *reus* released the *fideiussor* (rule 1). They account for this fact, as indicated above, by stating that the principal's original debt was destroyed by suing him and, therefore, the surety's obligation, being accessory in nature, could not survive. This consequence they seem to regard as so inevitable as to eliminate any discussion of whether or not it was desirable. Is the argument conclusive? No doubt, the liability of the *fideiussor* was accessory, i. e., dependent in some way upon the principal's obligation. How far, however, this dependence made itself felt is another matter. The classical jurists did not employ *accessio* as a term technical enough to determine the particularities of a given relation. They developed a great number of relations of dependence which we would define as accessory, but each followed its own course, according to the wording and interpretation of the respective procedural *formula* or business transaction. To characterize a certain device as accessory, therefore, does not yet indicate the precise nature and scope of the legal effects involved. It does, especially, not in itself imply that consumption of a

[48] See *infra,* n. 62.

principal *actio* by reason of *litis contestatio* also put an end to the accessory *actio.* Accessory inasmuch as it was designed to serve as a security of the debt was, e. g., a *pignus,* but it remained intact when issue was joined on the debt, because the *formula pigneraticia* as well as the *formula quasi Serviana* required for the extinction that the debt was satisfied in some way or another (Ulp. *Dig.* 13, 7, 11, pr. and § 1; Marcian. *Dig.* 20, 1, 13, 4).[49] Accessory was the *actio ex stipulatu rem pupilli salvam fore* in relation to the *actio tutelae,* and yet, in the absence of *eadem res, litis consumptio* did not work, so that it was left to the *iudex* to avert the unwarranted cumulation of actions (Ulp. *Dig.* 46, 2, 9, pr.).[50] The *actiones ex stipulatu iudicatum solvi* and *iudicati* stood, undoubtedly, in a most similar relation.[51] Likewise accessory was the *constitutum debiti,* both *proprii* and *alieni,* with reference to the principal debt, but again it is certain that *litis contestatio* in itself did not result in a discharge of the party not sued (Ulp. *Dig.* 13, 5, 18, 3).[52] Whether the *mandatum credendae pecuniae* may be added to this list is not sure. While the *mandator* was evidently not released by action brought against the debtor (Gai. *Dig.* 17, 1, 27, 5), it is not beyond doubt that already in classical law the liability of the *mandator* was dealt with as accessory to the debt.[53]

[49] *Konk.* I, 361, n. 5; Vážny, *op. cit.* (*supra,* n. 29), p. 172; Carrelli, *Sulla accessorietà del pegno nel diritto romano* (Rome, 1934), pp. 28 ff., 69 f.

[50] *Konk.* I, 192; II, 130 ff.; see also Rotondi, *op. cit.* (*supra,* n. 21), pp. 278 ff., 283 f. I am unable to follow Solazzi, *Istituti tutelari* (*supra,* n. 21), p. 142 ff. who discredits the text as largely interpolated.

[51] An analysis of the concurrence of these actions has not come down to us. For Afric. *Dig.* 46, 3, 38, 2 see *Konk.* I, 370 ff.

[52] A detailed interpretation of this text is given in the unpublished part of the second volume of the writer's book cited *supra* n. 1. At present it will be sufficient to suggest that the phrases *non litis contestatione* and *solutio . . . proficit* seem to be remnants of the original which is recognized to have differed from the extant version. An indication of the classical method of approach may be found in Afric. *Dig.* 46, 3, 38, 2. See also *Konk.* I, 373, n. 2 and Levy, Book review, *ZRG,* L (1930), p. 648.

[53] See Bortolucci, "Il mandato di credito," *Bullettino Ist. Dir. Rom.,* XXVIII (1915), 239 ff.; Siber, p. 298; Arangio-Ruiz, *Istituzioni di diritto romano,* 4th ed. (Naples, 1937), p. 408.

These instances seem sufficient to show how difficult and questionable it is to draw *a priori* conclusions from the accessory nature of a remedy. Everything rather depends on what the texts state in regard to the individual problem. As to that of *fideiussio,* they reveal in the first place that the rules concerning this suretyship were by no means entirely controlled by its accessory character.[54] There is, secondly, not a single passage offering an indication that rule 1 was based upon the accessory liability of the *fideiussor,* and this lack of evidence appears all the more significant because the compilers liked to work with the concept of *accessiones.*[55]

One text at last seems to prove directly that with respect to the novatory effect of *litis contestatio* the accessory nature of *fideiussio* was left out of account:

> *Scaevola lib. 1 responsorum* (*Dig.* 46, 1, 60): Ubicumque reus ita liberatur a creditore, ut natura debitum maneat, teneri fideiussorem respondit: cum vero genere novationis transeat obligatio, fideiussorem aut iure aut exceptione liberandum.

To be sure, the passage has not come down to us in its original version.[56] It is either a brief abstract of Scaevola's *responsum* or his closing statement in a case the incidents of which have been cancelled. Neither does the *inscriptio* offer much to locate the jurist's exact topic.[57] Moreover, alterations may have been made by substituting indefinite phrases for the precise technical terms of the formulary procedure. And yet, the extant remnant appears distinct enough and

[54] Flume, *Studien zur Akzessorietät der römischen Bürgschaftsstipulationen* (Weimar, 1932), pp. 5 ff.; Buckland, "Les limites de l'obligation du 'fideiussor'," *Revue historique de droit français et étranger* 4th ser. XII (1933), 118 ff.; Kunkel, p. 213, n. 3; see also Siber, p. 296; David, Book review, *ZRG,* LIII (1933), 610 ff.

[55] That much seems to have been demonstrated by Solazzi, "Nè accessiones nè adpromissores," *Bullettino Ist. Dir. Rom.* XXXVIII (1930), 1 ff. who, however, goes too far in assuming interpolations; see also Kunkel, p. 213, n. 3, Flume, pp. 7, n. 1; 127.

[56] Schulz, "Überlieferungsgeschichte der Responsa des Cervidius Scaevola," *Symbolae Friburgenses in honorem Ottonis Lenel* (Leipzig, 1935), p. 158.

[57] Lenel, *Palingenesia iuris civilis,* II (Leipzig, 1889), 292, n. 1.

shows a very definite classical flavor. Where the principal, it is stated, was released while a (natural) obligation remained,[58] the *fideiussor,* as an accessory debtor, continued to be bound. Where, however, the principal obligation was transformed by way of *litis contestatio,*[59] the *fideiussor* was discharged, whether *ipso iure* or *per exceptionem* (cf. Gai. III, 180-1). This antithesis would seem to be diametrically opposed to the view held by Siber and Buckland. It is well known that in classical law *litis contestatio* with the *reus* did not completely destroy his obligation. What remained was, in any event,[60] the *litis contestatione teneri* and, eventually, the *ex causa iudicati teneri* (Gai. III, 180). Considering, therefore, his accessory character, the *fideiussor,* if he assumed the whole risk (cf. Ulp. *Dig.* 46, 1, 8, 3), ought to have continued to be liable throughout these successive stages. He should have been bound to the same extent as the *reus* was,—in exactly the same manner as a *fideiussor totius causae post litem contestatam acceptus,* after judgment was rendered against the *reus,* survived the extinguished *litis contestatione teneri* and began *ex causa iudicati teneri* (Ulp. *Dig.* 46, 1, 8, 3).[61] If Scaevola, rejecting this consequence, regarded the *fideiussor* as discharged, he did so not because but although the *fideius-*

[58] Whether *natura* belonged to the original is not to be pursued here. Cf. on the one hand, Siber, *Naturalis obligatio* (Leipziger rechtswissenschaftliche Studien, LXXVII, Leipzig, 1925), p. 9 f.; on the other hand, Vážný, *op. cit.,* p. 172, n. 112; in general see also Levy, Book review, *ZRG,* LI (1931), 554, and Kunkel, p. 167. Scaevola may, e.g., have referred to an obligation restored by means of *in integrum restitutio* in case the principal suffered *capitis deminutio minima.* In so far Siber's suggestion was followed by Vážný, Flume, p. 99, n. 2, and Kaser, *Restituere als Prozessgegenstand* (München, 1932), p. 184, n. 6.

[59] Nothing else can be behind the phrase *genere novationis transeat obligatio.* Any other *novatio* would have worked *ipso iure* and without leaving any sort of obligation behind.

[60] To say nothing of the *naturalis obligatio* which has been rejected for the classical period by the majority of recent authors. For references see *supra,* n. 58.

[61] To this extent the genuine character of the passage has not been suspected. See Siber, *Naturalis obligatio,* p. 71 f., Vážný, *op. cit.,* p. 175 f. and the *Index Interpolationum* (Weimar, 1929 ff.) *ad hunc locum.*

sor was an *accessio*. The effect, then, of *litis consumptio* crossed that of *accessio* and came to prevail over it. The accessory nature of *fideiussio*, if it had any bearing upon *litis consumptio*, served only as a substitute for the wanting *eadem causa* and thus made possible the assumption of *eadem res* between the obligations of *reus* and *fideiussor*.[62]

One last argument may be dismissed briefly. In Justinian's compilation, it is true, the texts hinting at rule 1 are more numerous than those pointing at rule 2.[63] The relation, as stated above,[64] is six [65] to one. But in view of the disapproving attitude of the compilers, the fact means little for the classical law. Moreover, it is not without interest that among those six passages three are concerned with a problem which had no point when the surety was sued first (Proc. *Dig.* 46, 3, 84; Pomp. *Dig.* 44, 2, 21, 4; Pap. *Dig.* 15, 1, 50, 2), while the other three, being reports on a *rescriptum* (*Cod.* 5, 57, 2; 8, 40, 15) or *responsum* (Scaev. *Dig.* 46, 1, 60),[66] were occasioned by individual cases brought before the emperor or the jurist. There is, to my knowledge, one single text relating in a general manner to rule 1 without any reference to rule 2. It is Paul. *Sent.* 2, 17, 16, a passage incorporated only in the *Breviarium*:

> Electo reo principali [67] fideiussor vel heres eius liberatur. Non enim [68] in mandatoribus observatur.

[62] *Konk.* I, 190 ff. There were other instances of *eadem res* where the *causa* was not strictly *eadem* (*contra* Buckland, p. 2 f.). Consider the relation between *hereditatis petitio* and the ordinary action for recovery of a debt (*Konk.* I, 131 f.); between *actiones tutelae* and *rationibus distrahendis* (*Konk.* I, 109 ff., 143 ff.); or between *actiones empti* and *auctoritatis* (*Konk.* I, 114).

[63] Too strong is the assertion of Buckland, p. 7.

[64] P. 11 ff.

[65] Possibly seven, if Paul. *Dig.* 44, 1, 7, 1 is reckoned in (*supra* n. 27). But the topic of Paulus was to examine the *exceptiones* of the *reus* which might be used by the *fideiussor*. There was no occasion to go into *litis consumptio* as such.

[66] Pap. *Dig.* 27, 7, 7 is likewise a *responsum*, but see *supra*, n. 30.

[67] The *Interpretatio* presents this paraphrase: *Si quis contemto fideiussore debitorem suum tenere maluerit.*

[68] Cuiacius corrects *enim* to *idem*.

These statements, torn as they are from their original context, seem to be more than balanced by the passages quoted above [69] from *GE* and *RB*. Moreover, they fail to reflect in any way the full range of what Paulus necessarily must have discussed. The awkward reference to the heir of the surety, the indistinct connection of the two sentences, and the misleading plural *mandatoribus* are sufficient indications of the extent to which the model was contracted and of the carelessness with which the contraction was made. They furnish another proof of the incompletion and inaccuracy typical of the post-classical author of the *Sententiae*.[70]

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[69] P. 8.

[70] See, for the present, Levy, "Vulgarization of Roman Law in the Early Middle Ages," *Medievalia et Humanistica*, I (1943), 20 ff. and *passim*.

SOME REMARKS ON CATTLE-STEALING IN ROMAN LAW

(*Dig.* 47, 14, 3, 1 and *Bas.* 60, 25, 3)*

GOING over the pages of Heimbach's edition of the *Basilica* (= Hb.) is always instructive. The following inquiry will show how fertile can be an hour spent with its heavy volumes.

I

Dig. 47, 14, 3, 1 [1] reads as follows:

> *Callistratus libro 6 de cognitionibus:* Eum quoque plenius coërcendum, qui a stabulo abegit domitum pecus, non a silva nec grege.

The stereotyped edition of the Digest by Mommsen-Krüger, as well as the Italian Digest edition by Scialoja, Bonfante, Riccobono and others, do not contain any remark on the correctness of this text; nor does the *Index Interpolationum* list any suggestions as to its possible corruption. None of these editions [2] gives a hint of the fact that, instead of *plenius,* some authors following the *Basilica* read *lenius*—an emendation which reverses the meaning into the opposite.

It is not surprising that this important difference between the Greek text of the *Basilica* and their scholia on the one hand, and the Florentine manuscript of the Digest, on the other, has been overlooked; for Mommsen had made, in his major edition of the Digest, the following statement: "plenius" *Flor. cum Basilicis* (*Anon.*): σφοδρότερον. "lenius" *legit Doro-*

* The present article formed part of a collection of manuscripts presented to Professor Ernst Rabel on the occasion of his seventieth anniversary, January 28, 1944.

[1] Title 47, 14 of the Digest, *De Abigeis,* will be referred to hereafter by *h.t.*

[2] Likewise Lenel's *Palingenesia.*—The reference to Bonfante, *Corso di diritto romano,* II, 2 (Rome, 1928), 203 in the *Index Interp.* is a misprint, as the author dealt only with the principium of fr. 3 cit. and not with its section 1.

theus vertens πραοτέρως. Mommsen's note, however, is far from exact. First of all, the text of the *Basilica* says just the contrary of what Mommsen asserts, because *Bas.* 60, 25, 3 (Hb. V, 654) refers only to the final clause of Callistratus' text, i. e., to the words, *non a silva nec grege,* and with respect to these two cases the *Basilica*-version states:

ὁ ἀπὸ ἀγέλης ἢ ὕλης δεδαμασμένον ἄλογον ἀπελαύνων,[3] σφοδρότερον τιμωρεῖται.[4]

That is, translated into the language of the Digest: *is qui a grege vel silva domitum pecus abigit, gravius punitur.* Thus the *Basilica* took into consideration exactly those two cases which did not enter into Callistratus' statement. Therefore, since the case of cattle-stealing from a stable is neatly excluded from the text of the *Basilica,* Mommsen's testimony, *plenius cum B,* is wrong, even more so because the meaning of σφοδρότερον is not identical with *plenius;* it means *durius* or *gravius.*[5]

Another inaccuracy on the part of Mommsen is his reference to one *scholium* only, i. e., that of Dorotheos, sch. 1 *ibid.,* quoted below. He overlooks completely sch. 5 which also contains the Greek version of *lenius,* πραοτέρως. There, an unknown scholiast, doubtless of the post-Justinian era, explains the words σφοδρότερον τιμωρεῖται as follows: κατέχεται ὡς ἀπελάτης, *tenetur ut abigeus,* and completes the abridged contents of the text of the Basilica by the following statement:

ὁ δὲ ἀπὸ σταύλου ἀφελόμενος δεδαμασμένον ἄλογον, πραοτέρως κολάζεται.

[3] This Greek expression corresponds to the Latin *abigere.* Hence ἀπελάτης is the technical term for *abigeus, abactor,* and ἀπελασία for *abigeatus.* Some examples of the Greek terminology are to be found in Greco-Egyptian papyri, where complaints to officials on rustling are not scarce, see Preisigke's *Wörterbuch der griechischen Papyrusurkunden,* s.vv.—'Αποσπᾶν = *abducere* is a somewhat more elastic expression and also used sometimes with reference to theft of animals, as, for instance, in *P. Amh.* 2, 146 (cfr. R. Taubenschlag, *Das Strafrecht im Rechte der Papyri* [Leipzig-Berlin, 1916], p. 116; *id., The Law of Greco-Roman Egypt in the Light of the Papyri* [New York, 1944], p. 347, n. 160), but not, for example in *P. Oxy.* 6, 902, 6, where no real theft is involved. Some earlier papyri have περιελαύνω.

[4] Identical: *Synopsis Bas.* A 52, 2.

[5] Heimbach's translation, *graviter,* instead of *gravius,* is not correct.

This supplement is in perfect accord with Dorotheos' translation of the Digest in sch. 1, *ibid*:[6]

> ἐκεῖνος δὲ πραοτέρως κολάζεται, ὁ ἀπὸ σταύλου ἀφαιρούμενος δεδαμασμένον ἤδη ζῶον, καὶ μὴ ἐκ τῆς ὕλης ἢ τῆς ἀγέλης.

It is well known that Dorotheos, in his commentary,[7] followed the Digest verbatim. Here even the sequence *silva—grex* conforms with the Latin text, while in the *Basilica* the order is reversed.[8]

Thus all three Greek texts, written by different authors, present an undeniable evidence that the Digest had *lenius*, not *plenius*.

II

However, the mere confrontation of the passage in the Digest with the *Basilica* and their *scholia* may not seem quite convincing. Exaggerated scepticism may induce some one to say that the Greek commentators—namely, the so-called Anonymus whose *Index* was used abundantly for the composition of the official text of the *Basilica*, Dorotheos, and, finally, the unknown author of sch. 5—made use of a corrupt manuscript of the Digest in which the copyist had erroneously written *plenius* instead of *lenius*. Therefore, further arguments are necessary in order to prove which of the two variants is correct. It would have been, of course, a strange coincidence if all those Byzantine jurists had used manuscripts containing the same mistake; nevertheless the text deserves further consideration because there is no lack of additional arguments against the commonly accepted reading *plenius* and in favor of *lenius*. In fact, our text can be approached from different points of view, all of which throw light upon the treatment of rustlers in Roman law.

[6] Cfr. Hb. VI, 329.

[7] Cfr. Hb. VI, 36. P. Krüger, *Geschichte der Quellen und Litteratur des römischen Rechts* (2nd ed. Leipzig, 1912), p. 408; H. Peters, *Die oströmischen Digestenkommentare und die Entstehung der Digesten* (Leipzig, 1913), p. 44; F. H. Lawson, "The Basilica," *Law Quarterly Review*, XLVII (1931), 538.

[8] Only ἤδη has no equivalent in the Digest.

First of all, some linguistic observations. If I am correct,[9] there is no classical legal text with the locution *plenius coërcere* (or a similar verb, such as *punire, damnare, plectere*).[10] The correct expression for a more severe punishment is *gravius* or *durius*. Cf., for *gravius, Dig.* 49, 5, 5, 2 (Arrius Menander); 48, 19, 16, 9 (Cl. Saturninus); 23, 2, 68 (Paul.); 48, 19, 5, 1 and 8, 6 *eod.* (Ulp.); and two texts which are of particular value for our presentation because they are by Callistratus: *Dig.* 11, 4, 2 (*gravius coërceri*) and 48, 19, 28, 8 (*gravius vindicare*). As for *durius,* cf. *Coll.* 11, 6, 1 (Paul., with regard to rustlers) and *Dig.* 48, 11, 7, 3 (Macer).—On the other hand, *lenius punire* is not unknown in our sources. We find it precisely in Callistratus, *Dig.* 48, 19, 28, 12, as well as in Paul. *Sent.* 2, 26, 5 = *Coll.* 4, 12, 4 and Tryphoninus, *Dig.* 25, 2, 28 (*lenius coërceri*).

A difficulty seems to arise from *quoque* in our text, because it presupposes other examples of lesser thefts of animals in the foregoing text, while in its present shape the *principium* of Callistratus' text is dealing both with lighter cases (*furtum*) and more serious ones (*abigeatus*), and precisely the examples immediately preceding section 1 belong to the latter category. Fr. 3, pr. deals with the question as to what degree the number of stolen animals influences the classification of the offence as *abigeatus* or as *furtum*. We learn from it that only ten stolen sheep, five or even four pigs, one horse [11] or ox [12] made, in the opinion of some juridical authorities, the thief guilty of *crimen abigeatus*. This statement implies that theft of less than the numbers specified was considered as common *furtum* only. It is very likely that at the end of *Dig.* 47, 14, 3, pr.—

[9] The *Vocabularium Jurisprudentiae Romanae* has not yet published the article *plenus*.

[10] The meaning of *plenus* in locutions like *plenior praetoris animadversio* in *Dig.* 47, 10, 15, 28, or *plenissima coërcitio* in *Dig.* 7, 1, 17, 1, is quite different, since it refers there to the power to punish, which is accorded to the pretor or to a slave's master. It has nothing to do with the degree of punishment.

[11] But two mares, cfr. Paul. *Coll.* 11, 3 = *Sent.* 5, 18, 1.

[12] Paul, *loc. cit.* n. 11 requires the theft of two oxen for *abigeatus*.

before section 1—Callistratus had expressly stated this consequence. This supposition is based on a parallel text of Paulus, *Coll.* 11, 3, 1; here the jurist, dealing with the same question, enumerates cases of *abigeatus* with respect to the number of stolen animals (differing somewhat from Callistratus, as we have seen), and concludes *quidquid vero intra hunc numerum* (i. e., below the number of animals required for *abigeatus*) *fuerit ablatum, in poenam furti convenitur.* A similar phrase had probably been written by Callistratus, but the compilers cancelled it as superfluous, an alteration for which they should certainly not be blamed. They forgot, however, as they did so often, to adjust the following section 1 to this cancellation and to eliminate the *quoque,* which only in the original full text was in its right place. The text of the *Basilica,* on the other hand, is quite correct when it begins with καί (*et*= *quoque*), because here the conjunction refers to the preceding, more serious cases of cattle-stealing. And the two *scholia* dealing with milder offenses join the foregoing statements with the disjunctive δέ, which would be equally correct in the Digest after the abridged *principium,* because *quoque* should be changed there into *autem* or *vero.*

But the *tamen* which we read in the next section, fr. 3, 2 *h.t.,* lends additional support to the reading *lenius.* This text refers to a more serious case of cattle-lifting, i. e., *qui saepius abegerunt,* which beyond any doubt was considered as an *abigeatus,* cfr. *Coll.* 11, 2 (*saepius*);[13] 11, 7, 2; 11, 8; *Dig.* 47,

[13] I do not understand why Mommsen, *Römisches Strafrecht* (Leipzig, 1899), p. 774, 9, wished to cancel *vel* before *si* in this text. *Vel* is necessary to introduce the third example of *atroces abactores* after the two items mentioned before. With the omission of *vel* the text would mean that these two cases, i. e., *abigere equos et greges ovium de stabulo vel de pascuis,* would require that these offenses be committed more than once in order to be classified as *abigeatus*—a statement which would contradict other texts. The suggestion may be a simple *lapsus calami* of Mommsen: perhaps he wished to eliminate the conjunction *si* after *vel,* which is rather superfluous indeed. — Against Mommsen also E. Levy, "Paulus und der Sentenzenverfasser," *ZRG, Rom. Abt.,* L (1930), 275, n. 6, but for other reasons. He considers *abigere de stabulo* a case of *abigeatus,* in conformity with *plenius* in our text. The cancellation of the words, *vel de pascuis* in *Coll.* 11, 2 (proposed by Levy, *loc. cit.*) is, in my opinion, not necessary.

14, 1, 1. Through *tamen* the text is opposed to the slighter (*lenius*) case of section 1. If the reading *plenius* were correct, section 2 should read *quoque abigei sunt,* because then both texts would deal with *abigeatus* of one head of cattle.

III

The foregoing remarks attempt to defend the reading *lenius* by confronting the text of the Digest with the *Basilica* and their *scholia,* and by a number of merely linguistic arguments taken from the text itself as well as from legal terminology in general. In order to corroborate the result obtained by textual criticism, we should examine whether it is in agreement with the doctrine of other texts concerning cattle-stealing and its juridical construction as a peculiar, more severely punished kind of theft.

The fundamental reason why the case described in fr. 3, 1 *cit.* was considered as a common theft, *furtum*—this being the meaning of *lenius coërcendum*—appears to have been simply that the object of the theft was one animal only. We know from various sources that one of the basic criteria for the distinction *furtum—abigeatus* is the number of the heads of cattle stolen. This principle was expressed most clearly by a Roman jurist, Claudius Saturninus,[14] apparently a specialist on criminal law, as shown by the title of his sole work, *De poenis paganorum,* in *Dig.* 48, 19, 16. Sect. 7 of this text reads:

> quantitas discernit furem ab abigeo: nam qui unum suem subripuerit, ut fur coërcebitur, qui gregem, ut abigeus.

This text is also found in the *Basilica,* cfr. 60, 51, 15 (Hb. V, 861, after sch. 6). What is more interesting, however, is the fact that sch. 1 on *Bas.* 60, 25, 3 in its final phrase refers to that text. This reference proves that the composer of the *catena* to the *Basilica* found the correct way of explaining Callistratus' viewpoint. It was perhaps even Dorotheos him-

[14] Cfr. P. Krüger, *op. cit.,* p. 198; Berger, Art. "Jurisprudentia," in Pauly-Wissowa, *Realencyclopädie,* X, 1188.

self who in his commentary on the Digest mentioned Saturninus' text, and his quotation was changed by the unknown compiler of the *catena* into a reference to the corresponding text of the *Basilica.*[15]

With the exception of a male horse,[16] theft of one animal only is always a common *furtum,* unless it was repeatedly committed by the same delinquent, cfr. *Dig. h.t.* 3, 2. The classical definition of *abigeatus* (cfr. Ulp. *Dig. h.t.* 1, 1, confirmed by *Coll.* 11, 8, 1) speaks expressly of *pecora,* and similarly Paulus, *Coll.* 11, 3, preserved a second time in the *Lex Romana Visigothorum* (Paul. *Sent.* 5, 18, 1), as well as Callistratus, require for the condemnation of rustlers as *abactores* (*abigei*) the stealing of a quantity of animals: ten goats, five or at least four pigs, two mares, two oxen. Therefore Paulus, *Coll.* 11, 2, speaks of *pecorum abactores* and then of *equos* and *greges.* On the other hand, we have texts where the theft of one animal only is taken into consideration, cfr. Ulp. *Coll.* 11, 8, 2 = *Dig. h.t.* 1, 2: *qui porcam capram vel vervicem abducunt.*[17] *Non tam graviter* in these two texts is synonymous with *lenius* in our text. And furthermore, as we have seen in fr. 3, 2 *h.t.,* only when the theft of one animal was committed repeatedly was the wrongdoer punished as an *abigeus.*

But the best evidence for our contention that *lenius* is correct is given by Paulus, *Coll.* 11, 2 (second sentence), where cattle-theft from a stable is included in the definition of the term *abactores*:

> atroces autem (*scil.* abactores pecorum) sunt qui equos et greges ovium de stabulo vel pascuis abigunt *rell.*

[15] Here is found one of the mistakes in numbering which are quite frequent in the *Basilica;* instead of fr. 15, fr. 16 is quoted.

[16] Cfr. note 11, *supra.*

[17] Not *abigunt.*—The Roman jurists sometimes applied another term instead of the technical *abigere* (hence *abactores, abigei, abigeatus;* for *abactores* see, besides *Thes. L.L.* s.vv., *Archiv für lateinische Lexicographie,* I [1884], 428, and Götz, *ibid.,* pp. 558, 560), particularly where the offence is not qualified as *abigeatus.* Cfr. for instance *auferre*: Paul. 5, 18, 1 = *Coll.* 11, 3; *abducere*: *Coll.* 11, 5; 11, 8, 1 and 2 = *Dig. h.t.* 1, 1 and 2; *subripere*: *Dig.* 13, 1, 14, 2; 17, 2, 52, 3; 48, 19, 16, 7. For the use of *abactor* in Paul. *Sent.* see Levy, *art. cit.* (*supra,* n. 13), p. 273.

Here we find expressly stated that *equi* or *greges ovium* must be stolen from a stable if the delinquent is to be treated as a cattle-thief.

It is amazing that earlier writers who devoted some interest to Callistratus' text did not succeed in revealing the true reason for the rule formulated in fr. 3, 1 *cit.* It seems that this failure was caused by the circumstance that all those authors understood the expression *pecus* in a collective sense as cattle, a connotation which is not unknown, to be sure, in legal language, though less than in the non-legal Latin literature.[18] But the jurists distinguished *pecus* from *pecora* and the singular is very often used to denote a single animal, cfr. e. g., *Dig.* 17, 2, 52, 3; 9, 2, 39, 1; 19, 1, 13, pr.; 41, 2, 3, 13; 47, 8, 2, 20 and 21; 47, 14, 3, 2; Paul. *Sent.* 5, 18, 4; *Coll.* 11, 5: *bovem vel equum vel aliud pecus.*[19] It is also very characteristic that imperial constitutions at all times scrupulously avoided using the singular *pecus* when referring to a plural number of heads of cattle; in fact, the use of *pecora* in this sense is constant.[20]

With regard to our text, there is no reason to doubt that only one head of cattle is meant, because (1) *domitum*[21] *pecus* can by no means be referred to a tame flock of animals, which could be expressed only by *domita pecora;*[22] (2) both the immediately preceding final phrase of fr. 3 pr. and the following section 2 speak of one animal only: *equum bovem vel unum, unum vel alterum pecus;* and (3) all three Greek versions of the text understood the text as speaking of a single animal (ἄλογον, ζῶον).

[18] Cfr. *Thes. L.L.* I, 96 s.vv. *abigere, abigeus* etc. The use of *pecora* is more frequent.

[19] Further examples may be found with the aid of *Voc. Jur. Rom.* V, 594.

[20] Cfr. Mayr, *Vocab. Codicis Justin.* s.v. *pecus,* p. 1780, and, on the other hand, *Cod.* 9, 37, 1 (a. 395): *abactum animal.*

[21] For *domitus* see *Thes. L.L.* V, 1944.

[22] Cfr. e. g. *equa domita*: Varro, *R.R.* 2, 10, 11; *bos domitus*: *ibid.* 2, 5, 10; *boves domiti*: *Dig.* 35, 7, 8, pr.

IV

All these arguments—which have not been presented thus far in the literature relative to the matter—should furnish sufficient evidence for *lenius,* and not *plenius,* as the correct reading. The latter word was entered into the Digest probably through a mistake of the copyist who, in abstracting the text from Callistratus' booklet, *De Cognitionibus,* wrongly read *plenius* instead of *lenius.* From the paleographical point of view the mistake is surely to be excused. It seems to me, however, more likely that the mistake arose from writing under dictation, i. e., that the scribe confused two phonetically similar words. This origin of textual corruptions has not been sufficiently taken into consideration, as far as the Digest is concerned. I am convinced that many of the so-called interpolations could be explained as misapprehensions of a dictated word.

Thus the mere circumstance that the stolen animal was driven off from a stable was not sufficient to classify the offense as an *abigeatus;* it was rather the quantity of the stolen animals which was decisive. This is proved by Paulus, *Coll.* 11, 2, quoted before; the passage returns almost literally in the *Edictum Theodorici,* c. 57—a source in which Paulus' *Sententiae,* as is well known,[23] were freely exploited. Generally speaking, it was irrelevant whether the cattle were driven off from a stable or from the pasture.[24]

[23] Cfr. P. Krüger, *op. cit.* p. 359.—For the use of Paulus' Sentences in the Western codifications see E. Levy, "Vulgarization of Roman Law in the early Middle Ages," *Medievalia et Humanistica,* I (1943), 15.

[24] Mommsen's definition of *abigeatus* (*Strafrecht,* p. 772), should be modified accordingly: his citation (n. 7) of *Coll.* 11, 2 and *Dig. h.t.* 3, 1, as though they were equivalent is not exact, for the texts differ essentially. A good formulation is given by C. Ferrini, "Esposizione storica del diritto romano penale," in E. Pessina, *Enciclopedia del diritto penale italiano,* I (Milan, 1905), 224.—The definition given by Costa, *Crimini e pene da Romolo a Giustiniano* (Bologna, 1921), p. 174: "violent driving off of animals" needs correction. "Violent" should be cancelled, because *abigeatus* can be committed without resort to violence, as when, for example, the legally determined number of animals were stolen, or in the case of a repeated offense;

It is obvious why the thief of only one domestic animal was not treated so severely as an *abigeus*. The reason for the severe punishment of rustlers, *abigei*, was the need of a stronger protection for agricultural interest, particularly in countries where these offenses were more frequent. We learn this from various statements in Paulus' Sentences, the *Collatio*, title 11, and the Digest *h.t.* Such interests, however, were not threatened when only one head of cattle was stolen, and consequently there was no reason for inflicting upon the occasional thief, who stole just one or a small number of domestic animals, the same severe penalties as upon the professional rustler or the thief of a larger quantity of cattle.

The Roman distinction based upon the number of stolen animals later on passed into some medieval and modern legislations formed under the influence of Roman conceptions. For instance, the Spanish legislation, *Las Siete Partidas* (1263), 7, 14, 19,[25] took some figures from Roman sources. The death penalty, provided there for *abigeatus*, shows that in thirteenth-century Spain cattle-stealing was as customary as in the time of Hadrian. His rescript against *abigei* (*Dig. h.t.* 1, pr.) was addressed to the province of Baetica, whose population was known as *acerrimi abactores*.[26] The penal Codes of Italy of 1908 (art. 403, nos. 6 and 12) and 1930 (art. 625, no. 8), although divergent in details, differentiated the penalties according to the number and quality [27] of the stolen

use of arms by the wrongdoer involved heavier punishment. In case of violence, *vis* in the technical sense was present: the thief committed a *crimen vis* (cfr. *Dig.* 47, 8, 2, 21), which was a *crimen publicum* and involved a different procedure.

[25] Cfr. the edition of *Las Siete Partidas* by Samuel Parsons Scott (Chicago, 1931), p. 1387.

[26] Servius in *Verg. Georg.* 3, 407.—Servius knew well the legal terminology: with reference to *Aen.* 8, 208, where the earliest case of cattle-stealing from a stable is mentioned (*quattuor a stabulis tauros avertit*), Servius observes that the correct expression would be *abegit*. Cfr. *supra*, n. 18.

[27] The Code of 1889, art. 404, no. 12, even used the expression, *bestiame grosso*, which corresponds exactly to the *maiora animalia* of *Dig. h.t.* 1, 1. The distinction *pecus maius* (*boves, asini, equi*) and *pecudes minores* (*oves, caprae, sues*) is much older, cfr. Varro, *R.R.* 2, 1, 12.

animals, but left the aggravating designation independent of the circumstance whether the cattle was driven away from stables or fenced enclosures, from pastures or open fields.[28]

V

With Cujas, the Romanistic literature became aware of the difference existing between the Digest and the *Basilica.* Some authors even adopted the Greek version and corrected *plenius* into *lenius.* Cujas[29] was the first to follow the Byzantine texts, but his reasoning was that theft from a stable is more difficult than from a pasture and should therefore be punished less severely, while, on the other hand, he who profits from an easier situation (pasture), where theft is less difficult, should be punished more severely.[30] Against this argument, Chr. Thomasius[31] observed that theft from a stable is sometimes easier than from a pasturing herd, particularly at night. He argued that on the pasture the vigilance of shepherds may be an obstacle to stealing, while, on the other hand, sleeping of the watchman of a stable lures the thief. Furthermore, if the stable is locked, theft can easily become burglary (*effractio,* cfr. *Dig.* 47, 18). Thus there could be no question of *lenius coërcere.* Consequently, Thomasius rejected the Greek versions and the reading *lenius.*[32] The best evidence that Thomasius' reasoning was not without foundation is given by a medieval work of legislation, the Russian Code of the first half of the eleventh century, *Russkaja Pravda,* which

[28] Cfr. Manzini, *Trattato di diritto penale italiano secondo il codice del 1930,* IX (Turin, 1938), 282.

[29] *Observationes,* VI, c. 8 (*Opera,* ed. Frankfort, 1623, IV, 122).

[30] Cujas' opinion is followed by Voet, *Comm. in Pand.* (Venice, 1787), VI, 279: "facilius est custodia animalium stabulis inclusorum, nec ita patet abducendi occasio"; Rein, *Criminalrecht der Römer* (Leipzig, 1844), p. 323, for whom "the version *lenius* does not need any further proof." Cfr. G. Humbert in Daremberg-Saglio's *Dictionnaire,* s.v. *abigeatus,* I, 7; Saredo, *Il Digesto Italiano,* s.h.v. I (1884), 64, with rich comparative material.

[31] *De abigeatu* (3rd ed. Halle, 1739), p. 43.

[32] Against Cujacius also Ant. Matthaeus, *Comm. ad libros 47 et 48 Dig. de criminibus* (Antwerp, 1730), p. 213.

punished a cattle-theft committed in a stable twice as severely as the one committed on the field.[33] But all these arguments, more or less justified by considerations of criminal policy, have nothing to do with the Roman law, which did not make any distinction between the theft of cattle from a stable and that from other places. And among the aggravating circumstances which qualified a *furtum* as *abigeatus* (as, for example, the use of arms, repeated commission, use of hired accomplices), the one that was decisive was the number of the stolen animals and their importance in rural economy. If we believe in the genuineness of *Dig.* 3 pr. *h.t.*—we have already noted the probability of cancellation at the end of this text[34]—there were some divergences in details, regarding the number of pigs (five or at least four: Callistr. fr. 3, pr. *cit.;* five: *Coll.* 11, 3=Paul. *Sent.* 5, 18, 1; *Ed. Theod.* 57) or oxen (one: Callistr. *l.c.*; two: *Coll. l.c.*; *Ed. Theod. l.c.*; *Lex Rom. Burg.* 3, 4, 4). But does Callistratus' text deserve full confidence? The locution *quidam putaverunt* admits, of course, of the interpretation that the figures alleged by him were contested by other jurists. But the formulation *etiam quinque vel quattuor* is suspect, for if four pigs sufficed, the words *quinque vel* are superfluous; and the failure to mention the theft of two mares[35] is also striking. Therefore we must make allowance for the possibility that all these divergences in Callistratus' text did not originate from his pen.[36] We may be faced either with glosses which represent the post-classical views of some

[33] Cfr. L. Goetz, *Das Russische Recht*, I (Stuttgart, 1910), 33.—In the Penal Code of Soviet Russia of 1919, cattle-stealing is defined as theft of horses or major horned cattle, owned by the agricultural population. It is punished at least four times as severely as common theft, and, moreover, by confiscation of a part of the culprit's property.—Desjardins, *Traité du vol* (Paris, 1881), p. 327, rejects Cujas' argumentation and defends *plenius*, referring to the *Russkaja Pravda.*

[34] Cfr. *supra,* after note 12.

[35] Cfr. note 11, *supra.*

[36] I do not insist upon the construction *etiam—vel* (both conjunctions have here the meaning of "even"), because Callistratus, a Roman jurist of Greek extraction, is known for his linguistic shortcomings.

individual jurists of the fourth or the fifth century, or with genuine Justinian interpolations inserted in order to make the classical norms more severe. We shall see that late Byzantine legislation introduced more severe penalties for cattle-stealing. It is not unlikely that this development began already in Justinian's time; apparently this kind of offense had become a general plague, as it had been in the fourth century, cfr. *Cod. Theod.* 9, 30, 3 (a. 365): *adsiduae abactorum rapinae.* However, evidence which would allow a definite answer to the question whether gloss or interpolation, is not available in this case. One characteristic point should not be overlooked: in the Byzantine versions, both in the official text of the *Basilica* and in sch. 1 *cit.*, the reduction of the number of pigs to four does not appear; on the other hand, the principle that the theft of one ox sufficed for an *abigeatus,* as stated by Callistratus, is expressed by the Byzantines, too. In judging on the genuineness of fr. 3, pr. *h.t.,* this precious hint should not be disregarded.

VI

There remains one difficulty which requires our attention. How should we understand the final clause of our text: *non a silva nec grege?* Does it have to be interpreted, *per argumentum a contrario,* to the effect that the theft of a single animal *a silva vel grege* did not fall within the milder category and was therefore exempted from the classification as a common *furtum,* i. e., punishable as *abigeatus?* As we have seen,[37] the *Basilica* and the scholiasts interpreted the text in this manner. But there are serious objections to this interpretation. Nowhere else has the principle been expressed that stealing of but one head of cattle from a herd is an *abigeatus;* on the contrary, all passages referring to theft from a herd speak of a plurality of animals, cfr. *Dig. h.t.* 1, 1 = *Coll.* 11, 8, 1: *equos de gregibus, boves de armentis; Coll.* 11, 2: *equos et greges ovium; Dig.* 19, 2, 9, 4: *grex abactus, caprae.* The same is true with regard to the case of stealing cattle *a silva.* The

[37] Cfr. *supra,* at nn. 4, 6; Levy, *ZRG,* L, 275, n. 6.

word is used here in the sense of *silva pascua* (cfr. *Dig.* 50, 16, 30, 5: *quae pastui pecudum destinata est*)[38] or of those *loca silvestria* of which Varro speaks in *Rer. rust.* 2, 10, 6. Now, the theft of animals from a pasture, be it woods or a meadow, was treated in the same manner as was the theft from a herd, as stated in the same texts. And, finally, there is no essential difference between cattle on pasture land or in a herd, as an old definition of Cassius says: *pecora = quadrupedes quae gregatim pascuntur* (*Dig.* 32, 6, 5, 4).

Taken objectively, the locution, *non a silva nec grege* is not in agreement with several other texts, and therefore it is risky to understand and exploit it as an antithesis opposed to the principle expressed previously with reference to theft from a stable, even more so, because it can be attacked from the linguistic point of view. *Silva* is found here in an unusual sense, inasmuch as the complement, *pascua*[39] is missing. The phrase is not quite accurate because the legally relevant circumstance is not that the animals were driven off from a herd but that a whole *grex* (cfr. supra: *greges ovium, grex abactus*) or a certain number of animals forming part of a *grex* (vv. *equi de gregibus*) were stolen. In addition, the contrast between *a silva* and *a grege* is not so pointed, since both terms allude to a conglomeration of cattle on pasture land. On the other hand, it is conceivable that a herd is locked up in a stable; in this case theft from a herd (*a grege*) coincides with stealing from a stable. And finally: the syntactical position of the clause would be more correct, if it followed immediately after *a stabulo*. All these observations show the incorrectness, for various reasons, of the passage; together with the fact that its restrictive construction has the typical form of a gloss, they lead to the assumption that the five words were not written

[38] This is the only legal text in which this expression appears. It is omitted in *Voc. Jur. Rom.* V, 546, s.v. *silva*. With regard to sect. 3 *eod.*, where the term *integra* is explained, the author of the pertinent articles of the *Voc. Jur. Rom.*, B. Kuebler, is inconsistent in regard to the question whether the word refers to *silva* or to *terra*, cfr. IV, 594, 35 (*silva*) and III, 798, 41 (*terra*).

[39] The Greek version, ὕλη, is still more distant from the meaning of "pasture".

by Callistratus. They are more likely to represent a marginal gloss written by a post-classical reader of Callistratus' booklet who, in order to point out a factual element of the case, and not the different punishment, jotted down on the margin the remark: *non a silva nec grege* as an illustration of the words, *a stabulo;* but he was far from thinking that in these two examples the penalty should be different. This marginal note[40] passed into the Digest when the compilers inserted Callistratus' fragment and its section 1. The fragment was, after all, not unimportant, containing, as it did, the only reference to cattle-stealing from a stable in the whole title, since Ulpian, *Dig.* 1, 1, *h.t.* did not take this case into consideration.[41] The gloss was slipped, as so often, into the wrong place, thus betraying its spurious origin, and consequently gave rise to misinterpretations both by Byzantine and modern authors—misinterpretations which were contrary to the intention of the author of the gloss as well as to that of Justinian's compilers.

After the foregoing remarks we may attempt to reconstruct the original wording of Call. *Dig. h.t.* fr. 3, pr. and sect. 1:

> (pr.) Oves pro numero abactarum aut furem aut abigeum faciunt. Quidam decem oves gregem esse putaverunt: porcos etiam quinque [vel quattuor][42] abactos, equum [bovem][43] vel unum abigeatus crimen facere. <.....>.[44]
> (1) Eum quoque [p]lenius coërcendum, qui a stabulo abegit domitum pecus [, non a silva nec grege].

[40] This origin is clearly recognizable from the syntax: the text is an *acc.c.inf.* without a governing verb and still dependent upon the phrase, *quidam putaverunt,* of the foregoing text. If we supply these two words, the strangeness of the final clause becomes even more evident.—The translation of the phrase by S. P. Scott, *The Civil Law* (Cincinnati, 1932), XI, 4: ". . . who drives away a tame flock from a stable and not from a forest, or one forming part of a larger flock" (?) is unacceptable.

[41] Paulus' definition in *Coll.* 11, 2, however, considered this type of *abigeatus.*

[42] Gloss? Interpolation? Cf. *supra,* V, *i. f.* [43] Gloss?

[44] Something like this: <*eum vero qui pecora intra hunc numerum abegerit, non esse abigeum, sed furem.*> Cfr. Paul. *Sent.* 5, 18, 1 = *Coll.* 11, 3; *Ed. Theod.* 57.—The syntax of Paulus' text, although preserved in two sources, is heavily corrupt: the passage *fustibus rell.* is without subject and followed by a new change of subject which is also missing (*restituetur* sc. *servus*). Correctly *Ed. Theod. loc. cit.*

VII

Justinian did not contemplate any reform in the law on cattle-stealing; we do not know any particular decrees of the Emperor dealing with this crime. Nor have substantial interpolations been discovered. The only important interpolation in title 47, 14 of the Digest[45] touches upon the question of evidence, in a case which is not really one of *abigeatus*.[46] But I should like to refer on this occasion to a rather vague definition of cattle-thieves given by Justinian, which has not been mentioned in any manual and which I found only in the course of a haphazard search for ἀπελάτης in the last edition of Liddell-Scott's Dictionary.[47] I am referring to *Nov.* 22, 15, 1 (a. 536) which is a paraphrase of the well-known constitution of the Emperors Theodosius and Valentinian, *Cod. Just.* 5, 17, 18, 2 (a. 449), concerning the legitimate causes for divorce. Where the earlier imperial constitution spoke simply of *abactores,* Justinian felt obliged to explain what type of criminals the so-called ἀπελάται (the Greek term for *abigei, abactores*) were, as if title 47, 14 of the Digest had not satisfactorily done so. It is of great interest from the viewpoint of this inquiry that in his paraphrastical definition Justinian, too, speaks correctly of animals in the plural number.[48] So does Isidore of Seville who defines (*Etymol.* 10, 14) *abactor* as *fur iumentorum et pecorum.*

Cattle-stealing was not only frequently practiced in the Western part of the Roman Empire—witness the Western codifications (*Lex Romana Visigothorum* with its excerpts from Paulus' *Sententiae, Lex Romana Burgundionum, Edictum Theodorici*)—but in the Eastern Empire, too, the rural

[45] The second part of fr. 1, 4 *h.t.;* cfr. *Ind. Interp.*

[46] The interpolation in fr. 3, pr. *h.t.,* noted hypothetically above (cfr. n. 42), is dubious.

[47] Cfr. also *Thes. L.L.,* I, 94, v. 76; Levy, *art. cit.,* p. 273.

[48] Latin translation according to the *Authenticum*: "qui appellantur abigei, quibus est cura alienis insidiari animalibus aut iumentis et ea transponere alibi."

population had to suffer from this plague. Sanctions against it are found in the Byzantine legislation, in official and in private compilations of laws, even in those which are not at all voluminous. Curiously enough, the one codification that should most naturally be concerned with the matter, namely, the Rural Code called *Nomos Georgikos,* deals with this offense only once, in section 41 (theft of an ox or on ass), while its sect. 42 considers a situation which approaches the concept of cattle-stealing, but which in its factual development goes beyond the requisite of *abigeatus.*[49] However, the *Ecloga* (a. 726 or about 740) contains a norm specially aimed at rustlers. The passage (17, 13) reads:

> "He who committed cattle-stealing on a herd belonging to another person shall be flogged for the first time he did it; for the second time he shall be exiled, and for the third time he shall have his hands cut off, while it is understood that the animals which were driven off are to be returned to their owner."

The last words of the text: τῇ ἰδίᾳ ἀποκαθίστασθαι δεσποτείᾳ have been completely misunderstood by E. H. Freshfield in his translations of the Byzantine legal collections.[50] According to his translation the final phrase of the text said: "It being understood that the herds[51] which were lifted belong to the same owner." This premise was entirely unknown to Roman law in all periods of its developments, both in the classical and in Justinian's era, cfr. Paul. *Coll.* 11, 2 (v. *saepius*); 11, 7, 2; 11, 8, 1 = *Dig. h.t.* 1, 1 (*abigei studium quasi artem exercent*). Nor was it introduced by post-Justinian law; it is simply the translator's invention.

The later Byzantine law followed the tendency of severely punishing the crime of cattle-stealing. Formulations analogous to that of the *Ecloga* are found in the *Procheiros Nomos* (about 870-879), 39, 56; *Epanagoge* (a. 879-886), 40, 73, and,

[49] The case is that of an attempt to steal an ox from a herd; frightened away by the thief, the herd is devoured by wild beasts.

[50] *A Manual of Roman Law. The Ecloga* (Cambridge, 1926), p. 108; *A revised Manual of Roman Law. Ecloga Privata Aucta* (1927), p. 78.

[51] This translation of τῶν ἀπελαυνομένων is not precise.

in the period subsequent to the *Basilica,* in the *Epitome tōn Nomōn* (a. 929), 40, 20 and 21; the *Synopsis Basilicorum* (middle of the tenth cent.), A 52, 1 and 2; the *Epanagoge aucta* (late tenth cent.), 52, 49; the *Ecloga privata aucta* (early twelfth cent.), 17, 15 (= *Ecloga*), the *Ecloga ad Procheiron mutata* (early twelfth cent.), 20 [18], 19 (= *Nom. Georg.* 41) and 23; 37, 12; the *Synopsis Basilicorum Minor* (first half of the thirteenth cent.), A 49; the *Prochiron auctum* (about 1300), 39, 159; and in Harmenopoulos (about 1345), 6, 5, 13.

All these norms are nearly identical, and only the *Basilica* contain rather detailed regulations in the form of a succinct extract of the principal rules expressed in title 47, 14 of the Digest. It is, however, worth mentioning that the legislative work of Leo the Wise went beyond that of Justinian, by adopting the deterrent penalty introduced by the *Ecloga* and repeated in the *Procheiros Nomos,* 39, 56: amputation of hands in the case of a third offense, cfr. *Bas.* 60, 25, 4 (Hb. V, 654). This is all the more remarkable as neither the Digest nor the *Summa* of the so-called Anonymus—of which the official text of the *Basilica* is an excerpt—had known this penalty, and as hand-cutting for theft in general (except when committed with weapons or violence) had been expressly forbidden by Justinian's *Nov.* 134, 13 (a. 556), a statute which was even incorporated into the *Basilica,* 6, 19, 9 (Hb. I, 217). It was in consideration of this aggravation of penalties that the conscientious compiler of the *Basilica* expanded the catalogue of penalties for cattle-stealing given in the Digest (*h.t.* 1; 3) and copied in *Bas.* 60, 25, 1 (Hb. V, 653), by inserting amputation of one hand and torture.

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A NEW APPROACH TO BRACTON

HERMANN KANTOROWICZ'S posthumous book, *Bractonian Problems* (Glasgow, 1941) and the fourth volume of Professor Woodbine's edition of Bracton's treatise (New Haven, 1942), appearing almost at the same time, opened a new phase of Bractonian research. We now possess the whole treatise in the new edition which gives us a sufficient insight into the MSS and may safely be used as a basis for further inquiry. Kantorowicz violently attacked this edition (of which, however, he knew only the first two volumes) and ardently pleaded for a new and better one. But his severe censure is hardly justified,[1] and a new edition is, at least for our time, practically out of the question. We must work with Woodbine's edition in spite of its imperfections. It was Professor Woodbine's aim " to reproduce, as nearly as may be, that text which the manuscripts seem to show was the one which finally left Bracton's hand," [2] but he has certainly not reached this aim nor could he possibly reach it by his methods. The available MSS are thoroughly contaminated and therefore—as in all such cases—" philological " methods [3] do not suffice and pedigrees of manuscripts are of little use. Bracton's genuine text cannot be obtained from the manuscripts alone; a careful and minute study of the legal content is indispensable: " nobis et ratio et res ipsa centum codicibus potiores sunt." [4] Above

[1] See my paper " Critical Studies on Bracton's Treatise," *Law Quarterly Review*, LIX (1943), 172; also H. G. Richardson, "Azo, Drogheda and Bracton," *English Historical Review*, LIX (1944), 45, n. 1.

[2] Vol. IV, p. ix of his edition.

[3] On the true philological methods see P. Maas, *Textkritik* (Gercke-Norden, Einleitung in die Altertumswissenschaft I, 2, Leipzig, 1927); *Byzantinische Zeitschrift*, XXXVII (1937), 289 ff.

[4] Rich. Bentley, *In Q. Horatium Flaccum Notae et Emendationes* (Cantabrigiae, 1711), p. 147 ad Hor. *Carm.* III, 27, 15.

all we must try to discover Bracton's sources. These were, as is well known, not only English. His book has not an insular but a European character [5] and must be studied within the framework of the European legal (especially legistic and canonistic) literature of his time. It is in this way that we may hope to reach a right judgment on the readings of our MSS. But this painstaking work wants considerable time and we must not reproach Professor Woodbine for having left it undone. We must be grateful to him for what he has achieved so far and take his work as a basis for further research. This is now our task.

Kantorowicz's passionate attack was unjust and may be quietly set aside. But his book contains a discovery of basic importance which once more and unfortunately for the last time showed his genius. His " central thesis ", as he himself called it,[6] is the following: All our MSS go ultimately back to one archetype which was the work of an anonymous redactor. Bracton's original manuscript is probably lost forever. He left at his death an unfinished rough draft to which he had made numerous additions in the course of his life. The redactor prepared this difficult manuscript for publication; it was a hard task and no wonder that he made a failure of it. He sometimes misunderstood Bracton's abbreviations and sometimes inserted his marginal notes in the wrong places. Obviously these corruptions cannot be corrected by the help of our MSS as they were already contained in the archetype. But they may sometimes be corrected by going back to Bracton's sources, sometimes by circumstantial evidence and " the art of deduction ". Kantorowicz tried to demonstrate this method in a number of passages; here, however, he was less fortunate and some of his conjectures are quite unacceptable.[7] Nevertheless his central thesis stands.

[5] See Plucknett, " The Relations between Roman Law and English Common Law," *The University of Toronto Law Journal,* III (1939), 39 f.

[6] *Bractonian Problems,* pp. 36-38.

[7] See my above cited paper.

To illustrate these generalities I will give an example. I take a short section of Bracton's treatise which is easy to understand and permits us to focus our attention on textual criticism. I give the text according to Woodbine's edition, but distributed into numbered paragraphs in order to facilitate citing. Synoptically with Bracton's text I give his (hitherto unknown) sources.

Bracton, fol. 411v

(1) Dictum est de exceptionibus, quae competunt contra iurisdictionem. Nunc videndum, si sit aliqua, quae competere possit contra personam iudiciarii, ut si aliqua ratione habeatur suspectus timore, odio vel amore.

Tancred, Ordo iudiciar. II, 5, 1

Si vero his exceptionibus (scil. quae ex ipsa iurisdictione competunt) destituitur, si qua ex persona iudicis reo competit, illam proponat; puta . . . vel quia est reo certa ratione suspectus, utpote inimicus suus, vel adversarii consanguineus vel multum amicus.

Decretum Gratiani, C. 11, qu. 3, c. 78

Quattuor modis pervertitur humanum iudicium: timore . . . cupiditate . . . odio . . . amore.

Gloss. "timore" *ad h.l.*: . . . sed si odio vel amore lata est . . .

(2) Et non video, quare debeat recusari, quia, si male iudicaverit ex certa scientia, litem suam facit et tenebitur ad restitutionem damnorum, cum de hoc per superiorem fuerit convictus. Si autem per imperitiam, non sic, sed summoneri poterit, quod veniat et faciat recordum, ut ea, quae correctione indigent, corrigantur et in statum debitum reformentur.

(3) Melius tamen est, ut videtur, in tempore occurrere, quam post causam vulneratam remedium quaerere,

Cod. Iust. 2, 40, 5, 1

Melius etenim est intacta iura eorum servari, quam post causam vulneratam remedium quaerere.

Cod. Iust. 3, 27, 1 pr.

Melius enim est occurrere in tempore, quam post exitum vindicare.

ut suspectus amoveatur et ei substituatur non suspectus,

Decretum Gratiani, C. 3, qu. 5, c. 15

cum nihil gratius detur inimico, quam si detur ei adiudicandus, quem damnificare intendit,

Nam quid gratius et amabilius dare quis inimico potest, quam si ei ad impetendum commiserit, quem laedere forte voluerit?

Gloss. ad. h. l.: "ad impetendum," id est ad puniendum vel iudicandum.

Tancred, op. cit. II, 6 pr.

et valde meticulosa res est, sub iusticiario litigare suspecto, quia saepius tristissimum sortitur eventum.

Quia valde meticulosa res est sub iudice litigare suspecto et interdum tristissimum sortitur eventum, ideo post tractatum exceptionum consequenter de recusationibus iudicum videamus.

Tancred, II, 6, 6[8]

(4) Causa vero recusationis unica est, scilicet suspicio. Quae consurgit multis ex causis, scilicet si iusticiarius sit consanguineus petentis, [homo vel subditus, parens vel amicus, vel inimicus tenentis,] affinis, familiaris vel commensalis, consiliarius vel narrator suus extiterit in causa illa vel alia, et huiusmodi.

Causa recusationis unica est, scilicet suspicio. Quae consurgit multis ex causis, puta quia iudex est consanguineus actoris vel eius, qui litteras impetravit; vel fuit eius advocatus in eodem negotio . . . item si est affinis eius . . . item si familiaris vel commensalis . . . item si dominus eius . . . item si est vasallus vel subditus actoris vel eius qui litteras impetravit . . . item si appellatum fuit ab eodem iudice in illa causa vel etiam in alia . . . item si inimicus eius qui convenitur.

Bracton deals in this section with the so-called *recusatio iudicis suspecti*. This issue has been fully discussed in both the legistic and the canonistic literature of the twelfth and thirteenth centuries. The predominant doctrine of the legists was: *recusatio iudicis suspecti* is only permitted if the judge is a *iudex delegatus*, and not if he is a *iudex ordinarius*. The canonistic doctrine, however, permitted the refusal in both cases. The medieval literature on this discussion is easily

[8] I have omitted Tancred's references to the law books.

accessible, as a great deal of it has been printed in more or less reliable editions.[9] But we need not deal with it here, as it was without any interest for Bracton. According to his doctrine the English king is the only *iudex ordinarius in temporalibus*, his *iudiciarii* being mere *iudices delegati*.[10] Hence the right to refuse a suspect *iudiciarius* was for him recognized by both Civil and Canon Law and therefore in his opinion beyond any doubt or discussion. He chose Tancred's famous *Ordo iudiciarius* to be his leading source, as he usually did in questions of Civil Procedure.[11] But he remodelled his text, as he was wont to do, not only by shortening and simplifying it but also by making additions which he took partly from other sources. Let us now turn to Bracton's text.

(1) The first paragraph has obviously been taken from Tancred; only the last four words come from another source, most probably from a passage in the *Decretum Gratiani* or the gloss on this passage. I have given these texts above.

(2) In the second paragraph there follows an objection which might be possibly raised against the legistic and canonistic doctrine. To be sure, the text given by Woodbine is

[9] See G. Haenel, *Dissensiones Dominorum* (Leipzig, 1834), p. 5: *Vetus coll.*, 3, with ample references; Johannes Bassianus, *Ordo iudicior.* ed. Tamassia and Palmieri, *Bibliotheca Jurid. Medii Aevi*, II (Bologna, 1892), § 19, p. 215; Pseudo-Pillius, *Ordo. iudic.*, ed. F. Bergmann, *Pillii Tancredi Gratiae libri de iudiciorum ordine* (Göttingen, 1842), II, 7; ed. L. Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, V, 1 (Heidelberg, 1931), tit. 22, p. 40; Gratia, *Ordo iudic.* ed. Bergmann, II, 5 and 6; Damasus, *Summa de ordine iudic.* ed. Wahrmund, *Quellen*, IV, 4 (Innsbruck, 1926), tit. 28 ff., p. 22 ff.; Willielmus de Drogheda, *Summa aurea*, ed. Wahrmund, *Quellen*, II, 2 (1914), tit. 436, p. 374; Richardus Anglicus, *Ordo iudic.* ed. C. Witte (Halle, 1853), p. 65; ed. Wahrmund, *Quellen*, II, 3 (1915), p. 113, n. 6; Bernardus Papiensis, *Summa decretalium*, ed. Laspeyres (Ratisb. 1860), II, 20, 13-15. See further Seckel and Genzmer, "Ueber die Summa de ordine iudiciorum 'Invocato Christi nomine'," *Sitzungsberichte der Preuss. Akadamie der Wiss.* phil.-hist. Klasse, 1931, p. 409 f.

[10] "Dictum est in proximo de ordinaria iurisdictione, quae pertinet ad regem; consequenter dicendum est de iurisdictione delegata..."

[11] For another example see my above cited paper. See further Bracton, fol. 34: "Et sciendum, quod privatorum instrumentorum tres sunt species etc.," taken from Tancred, *Ordo*, III, 13, 2 and 4.

scarcely intelligible. Bracton cannot possibly have written: "I see no reason for granting a *ius recusandi* to the defendant," for in the following paragraph he actually gives such reasons, which seem to him decisive. Now, according to the usage of the legistic and canonistic literature such "objections" are introduced by the word *videtur*. Several of our MSS read *videt*, obviously a corruption of *videtur*, as *videtur* often was written *videt* with a sign of abbreviation. One of our MSS has even *videtur* and in the third paragraph our MSS have preserved *videtur*. Further, *quare* must be emended into *quod*, equally a corruption caused by wrongly expanding an abbreviation. Bracton wrote either: "Et non videtur quod debeat recusari" or: "Et videtur quod non debeat recusari."

The legal content of this second paragraph needs a short explanation. Bracton declares: "If the judge wilfully gives a wrong judgment in favor of the plaintiff, the defendant has an action against the judge to recover damages. If the judge acted in ignorance, the defendant may appeal to a higher court, but he has no action for damages against the judge." Bracton knew of course very well that according to Civil Law the defendant had an action for damages in both cases,[12] for Azo, his usual adviser in matters of Civil Law, had plainly said:[13]

> Iudex igitur, si male iudicat, si quidem dolo, tenetur ex maleficio, si vero per imperitiam, tenetur ex quasi maleficio.

Bracton cannot possibly have misunderstood this simple sentence. So when he differed from Azo, he did it on purpose, because he disapproved of the action for *negligentia iudicis*. He hereby shows anew that he was far from being an unthinking compiler. He read his sources critically and left out

[12] See Gaius, *Inst.* 4, 52; *Inst. Iust.* 4, 5, pr.; *Dig.* 5, 1, 15, 1; 21, 2, 51, pr.; 44, 7, 5, 4; 50, 13, 6; *Cod. Iust.* 7, 49, 2; Windscheid, *Pandekten*, ed. Th. Kipp (9th ed. Frankfurt, 1906), II, § 470, n. 1; Ernst Levy, *Privatstrafe und Schadensersatz* (Berlin, 1915), pp. 48 ff.; Lenel, *Edictum perpetuum* (3rd ed., Leipzig, 1927), p. 168.

[13] *Summa Inst.* ad rubr. 4, 5; *Summa Cod.* ad rubr. 7, 49.

whatever seemed to him unpractical.[14] In this way he unconsciously came nearer to the law of the classics; for it ought not to be disputed any longer that the monstrous action for *imprudentia iudicis* of every kind was unknown to classical law.[15] To be sure, he may have seen a considerable support in the following passage of the Digest:

> (*Dig.* 5, 1, 15, 1:) Iudex tunc litem suam facere intellegitur, cum dolo malo in fraudem legis sententiam dixerit.

Here, *litem suam facere* seemed to be confined to the case of *dolus iudicis*. But it was his own sound instinct and his independent and practical mind which led Bracton to cleave to this passage and to set aside others contradicting it.

Incidentally, it may be observed that this doctrine of his also occurs in another part of his treatise, *viz.* in the part *de actionibus*,[16] but here indeed in a rather queer shape. Bracton read in the Institutes the following text:

> (*Inst. Iust.* 4, 5 pr.:) Si iudex litem suam fecerit, non proprie ex maleficio obligatus videtur. Sed quia neque ex contractu obligatus est et utique peccasse aliquid intellegitur, licet per imprudentiam, ideo videtur quasi ex maleficio teneri.

Bracton wished to confine *litem suam facere* to the case of *dolus iudicis* and accordingly wrote the following text:[17]

> Item nascitur obligatio ex maleficio vel quasi.
> Et maleficium provenit ex delicto et iniuria, quae quidem sub se plures continet species, ut si quis crimen laesae maiestatis commiserit, homicidium vel furtum et huiusmodi.
> Vel quasi ex maleficio, ut si iudex scienter male iudicaverit [obligatus esse videtur quasi ex delicto].[18] Sed quia neque praecise ex maleficio neque ex contractu obligatus est et aliquid peccasse intellegitur, licet per imperitiam, ideo videtur quasi ex maleficio teneri.

[14] See Plucknett, *loc. cit.*

[15] Though it was not confined to *dolus*, as Gaius, 4, 52, shows.

[16] Fol. 99.

[17] Maitland, *Bracton and Azo* (Selden Society, VIII, London, 1894), p. 142, overlooked the problem.

[18] The words included in brackets must be interpolated, as they destroy the construction of the sentence and anticipate the point.

Bracton unfortunately failed to observe that the words, *licet per imperitiam* [19] were not compatible with his new doctrine. Nevertheless there cannot be any doubt about the legal rule which he wished to establish.

(3) We now turn to the third paragraph. Here Bracton rejects the objection raised in the preceding paragraph. He alleges three arguments in favor of a right to refuse a suspect judge, each taken from a different source.

a) The first argument (*melius — non suspectus*) is taken from the *Codex Iustinianus* by combining the two passages given above. Bracton possibly found the maxim in this form somewhere, but it is equally possible that he himself combined the two passages. "Melius est intacta iura servari quam post causam vulneratam remedium quaerere" was a well known legal maxim of the thirteenth century,[20] and if Bracton looked up this passage in the *Codex Iustinianus,* which he of course read *adiuncta glossa,* he found in the gloss the other passage cited.[21]

b) The second argument (*cum nihil—intendit*) is taken from the *Decretum Gratiani.* The passage, which Bracton found cited by Tancred, shows at once that Woodbine's text needs a correction. Bracton cannot possibly have written *adiudicandus*; he well knew the legal sense of *adiudicare,* and an *adiudicatio* of the defendant to the plaintiff is of course out of the question. Bracton found in his source the artificial phrase, *ad impetendum commiserit.* As was his wont, he replaced it by a simpler and more current expression and this could not be anything else but *ad iudicandum dederit.* In fact some of our MSS have *adiudicandum,* i. e., the right reading, if we only separate *ad* and *iudicandum.* Bracton simply followed the *Glossa ad Decretum.* Johannes Teutonicus had equally thought it wise to paraphrase the artificial expression

[19] Bracton wrote *imperitiam* (instead of *imprudentiam*), following Azo.

[20] See e. g. Albertus Gandinus, *Tractatus de maleficiis*, ed. H. Kantorowicz (Berlin-Leipzig, 1926), p. 47, line 16.

[21] Gl. "quaerere" ad *Cod.* 2, 40, 5. On the other hand, he found in Gl. "in tempore" ad *Cod.* 3, 27, 1, the former passage cited.

ad impetendum: "id est," he explained "ad puniendum vel iudicandum". I think this is final. Bracton of course knew the Gloss and copying it wrote *ad iudicandum* and not, as Professor Woodbine believed, *adiudicandus*. In this case as well as in the former (concerning *videtur*) Woodbine had the right reading before him, but rejected it and chose the wrong.

A severe critic may object against this second argument that it stands in the wrong place. It concerns only the *recusatio propter inimicitias* and is therefore unfit to justify the *recusatio iudicis suspecti* in general. This is true; nevertheless we must not regard this sentence as an interpolation, for we must never forget that what we read is only a rough draft. We may well credit Bracton with such slight logical slips in a draft.[22]

c) The third argument is taken from Tancred's *Ordo* and needs no further discussion. Even before discovering this source I deduced from the artificial and quite un-Bractonian Latin that Bracton had copied here another author.

(4) The fourth and last paragraph of our text deals with *causae suspicionis*. Bracton's list of such *causae* looks strange, and all the more so when compared with its original. Bracton's source was again Tancred. He abridged his text, particularly by cancelling the quotations which Tancred had made from the law books. He further wrote *homo* instead of *vasallus*, also *consiliarius vel narrator* instead of *advocatus*, and made other slight alterations. So far there is nothing surprising in his manipulation. What is in fact astonishing is the queer order or rather disorder in which the different *causae* are arranged, whereas they follow in good order in Tancred's list. First *consanguineus* is mentioned, then follows *parens*, quite illogically, as *parens* is a special kind of *consanguineus*. Then *amicus* is mentioned, and later, equally without logic, *familiaris vel commensalis*. But the worst is certainly *inimicus tenentis* (enemy of the defendant) in the middle of persons who are connected by kinship or friendship with the plaintiff. The reader of this text is in danger of referring *tenentis* not

[22] For another example see my above cited paper, p. 177.

only to *inimicus,* but equally to the preceding *homo vel subditus, parens vel amicus* and to the following *affinis vel familiaris vel commensalis.* A modern editor may try to prevent this error by including *vel inimicus tenentis* in commas, but medieval MSS had either no punctuation or an insufficient one. We cannot possibly tax Bracton with having wilfully destroyed Tancred's reasonable order, so to speak with "playful perversity",[23] and therefore must needs come to the conclusion: it was *not* Bracton who wrote this text. There is, I believe, only one explanation. Bracton, endeavoring to shorten his model, omitted in his first draft the words which I have enclosed in square brackets. He could safely do so, as Tancred's list was only a list of examples, which he might abridge ad libitum. Afterwards Bracton, revising his original draft, made some marginal additions, noting *parens* to *consanguineus, amicus* to the unusual terms *familiaris* and *commensalis,* and adding *inimicus tenentis.* Of course we cannot say in what way Bracton would have made use of these marginal notes, if he himself had framed a final text for publication. The redactor knew no other way out than to insert them in the original draft and so framed the chaotic text which we read today. As the redactor's manuscript was the archetype of all our extant MSS, the latter must needs contain the same disorder. Taking account of what we know of the redactor's methods by earlier inquiries, I cannot see anything impossible or improbable in my explanation, and unless another can be suggested at least equally plausible, it may be taken as the truth. The task of the textual critic is herewith ended. He cannot and must not frame a blameless text which in fact never existed.

A thorough analysis of Bracton's treatise will enable us to correct numerous passages in Woodbine's edition. By this prophecy I do not wish to disparage Professor Woodbine's great work, but to invite to a new approach to Bracton.

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[23] Maitland, *Bracton's Note Book* (London, 1887), I, 4, n. 2, wrongly taxed Bracton with "a playful perversity".

JURIDICAL LEXICOGRAPHY AND THE RECEPTION OF ROMAN LAW *

In Memoriam
D. D. Adolfi Wach
Jurisconsulti Praestantissimi,
Magistri et Amici Carissimi
1843-1926

I. *Receptio Juris Romani.*

AMONG the numerous "receptions of Roman law" in the course of European legal history one event stood out to the extent that, in Central Europe, it almost monopolized the term. "Reception of Roman law" κατ' ἐξοχήν designates that development of historical significance, from the fourteenth up to the seventeenth century, in the course of which Central Europe, and Germany in particular, turned from its native customary law to Justinian's *Corpus Juris,* from its popular courts of lay judges to professional tribunals composed of learned lawyers, from its own language to the esoteric Latin of the Roman law sources. The adoption or reception of the Roman law set in very early in the Middle Ages and made itself felt particularly in the heart of Europe. The Church which had early incorporated many principles of Roman law into her system of Canon law, was first to transmit ideas and institutions of ancient Rome to the medieval world. The interest in Roman law received a new and decisive stimulus through the rediscovery of the Roman law codes and the

* *Habent sua fata—dissertationes.* More than twenty years have passed since the present author announced his intention to publish a comprehensive study on the history of juridical lexicography in Central Europe in the period of the reception of Roman law; see Guido Kisch, *Beiträge zur Geschichte der Rezeption,* I (Leipzig, 1923), 6. For twenty-five years he collected material from widely scattered places. The problem posed could be solved successfully only on the basis of extensive researches in manuscripts and incunabula at one time available in European libraries. Present war conditions have postponed such studies at least for an indefinite period. This writer, therefore, assumes that a provisional account of his investigations may be both justified and welcome at this time.

subsequent revival of their study in Northern Italy, at the end of the eleventh and in the twelfth century. A renaissance of the Roman law set in and found its center particularly in Bologna, continuing to the mid-thirteenth century. The flourishing schools of the Glossators and Commentators of the Roman law attracted students from all of Europe, in particular from Germany, Austria, Bohemia, and Poland. Upon their return, they propagated and disseminated the teachings of the foreign law in their respective homelands. Thus, in the fourteenth century, Roman-law ideas began vigorously to penetrate legal thought almost all over Central Europe. Only few countries were left untouched by the powerful influx of ancient legal thought, such as Switzerland and Schleswig-Holstein for political reasons, whereas in Saxony the native law had been so strongly developed in legal practice and juridical literature that Roman-law rules were recognized only as secondary or supplementary sources of the law.

The reception of Roman law comprised Justinian's codification, the *Corpus Juris Civilis,* in its original form and its original contents *in complexu.* First restricted to juridical thought and literature, the " reception " gradually outgrew the " theoretical " stage and, in the fifteenth century, became transformed into a powerful movement, striving for the general adoption of Roman-law principles and rules in all avenues of legal life: the " practical " reception of Roman law. The final result was an almost complete victory of the foreign over the autochthonous law, for the first time officially recognized by the legislation of the Holy Roman Empire in the *Reichskammergerichtsordnung* of 1495. From then on a widely disseminated movement of " popular " jurisprudence was at work with growing weight to spread knowledge of Roman law beyond the world of lawyers and law courts among the officials and, through all these various channels, into the widest circles of the populace, in the German language and an easily understandable form. The invention of printing gave much stimulus and support to this Romanizing trend in medieval jurisprudence and legal practice.

Although a voluminous literature treats of the fate of Roman law after the downfall of the Roman Empire, there is no comprehensive monograph on the reception of Roman law in general and its influence on the development of the various European legal systems in the Middle Ages.[1] The most discussed subjects in the otherwise rich and valuable literature were: causes and extent of the theoretical reception; study and re-interpretation of the *Corpus Juris Civilis* by Glossators and Commentators and their disciples; the actual influence of the Roman law on the legislation in individual countries, and the Romanization of territorial laws or local statutes in particular.[2] The most decisive event in this development lasting for centuries was, however, the practical reception, namely the infiltration of Roman law into the judiciary. This came about through the replacement of the lay-judges by professional jurists trained in the Roman law, and the general recognition of the Roman codes as valid sources of the living law. It was the aforementioned juridical liter-

[1] For the term "Reception of Roman law," cf. Ernst Levy, "Reflections on the First 'Reception' of Roman Law in Germanic States," *American Historical Review*, XLVIII (1942), 20.—For bibliography, see Richard Schröder and Eberhard von Künssberg, *Lehrbuch der deutschen Rechtsgeschichte*, 7th ed. (Berlin-Leipzig, 1932), pp. 864 ff.; Heinrich Brunner, *Grundzüge der deutschen Rechtsgeschichte*, 8th ed. (Munich-Leipzig, 1930), pp. 258-266; Claudius von Schwerin, *Grundzüge der deutschen Rechtsgeschichte* (Munich-Leipzig, 1934), pp. 233-240; Rudolf Hübner, *Grundzüge des deutschen Privatrechts*, 5th ed. (Leipzig, 1930), p. 18, note 1; Eberhard von Künssberg, Article "Rezeption," *Handwörterbuch der Rechtswissenschaft*, V (Berlin, 1928), pp. 128 f.; Hermann Kantorowicz, "Note on the Development of the Gloss to the Justinian and the Canon Law," in Beryl Smalley, *The Study of the Bible in the Middle Ages* (Oxford, 1941), p. 39, note 1; Guido Kisch, "American Research in Mediaeval Legal History," *The Jurist*, II (1942), 219; 243, note 12.—Of monographs, see in particular, Georg von Below, *Die Ursachen der Rezeption des Römischen Rechts in Deutschland* (Munich-Berlin, 1905); Paul Vinogradoff, *Roman Law in Medieval Europe*, second ed. by F. de Zulueta, (Oxford, 1929), with bibliographical notes; Woldemar Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipsig, 1938).

[2] As to the last-mentioned subject, cf. Johann Christoph Schwartz, *Vierhundert Jahre deutscher Zivilprozess-Gesetzgebung, Darstellungen und Studien zur deutschen Rechtsgeschichte* (Berlin, 1898).

ature, intended to "popularize" Roman and Canon law among the unlearned or half-learned officials and laymen, which found foremost attention among modern scholars.[3] One need only think of Sebastian Brant's *Klagspiegel* (1516), "the first voluminous attempt at translating a work of Roman jurisprudence," or Ulrich Tengler's *Laienspiegel* (1509), an encyclopedic work on Roman-German private, criminal, and procedural law, followed by the bulky translations of Justinian's *Institutes* by Murner, Fuchsperger and Perneder. Systematically arranged *Summae Legum* go back to the fourteenth century, and the same applies to alphabetically arranged encyclopedic introductions to the foreign law, the most popular among them the *Vocabularius Juris Utriusque* (1452) compiled by the Doctor Jodocus of Erfurt, which went through no less than seventy-three editions between 1475 and 1622.[4] The painstaking researches of Roderich Stintzing and Emil Seckel, minute and philologically as well as juridically penetrating, have definitely—even if not completely—depicted the influence of this comprehensive "mechanical" legal literature on the victorious advance of Roman law in Central Europe.[5]

[3] Roderich Stintzing, *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland am Ende des fünfzehnten und im Anfang des sechszehnten Jahrhunderts* (Leipzig, 1867); Emil Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter*, I: "Zur Geschichte der populären Literatur des römisch-kanonischen Rechts" (Tübingen, 1898); further studies in this field planned by the last-mentioned author, who promised publication of two additional volumes, unfortunately remained unpublished. For criticism of Stintzing's theories in general and particularly his conception of "*populäre* Literatur des römisch-kanonischen Rechts," see von Below, *Die Ursachen der Rezeption des römischen Rechts in Deutschland*, p. 111 f. and *passim*. Some decades earlier, Theodor Muther had correctly remarked in his *Zur Geschichte der Rechtswissenschaft und der Universitäten in Deutschland* (Jena, 1876), p. 165: "Mit Hülfe der Handschriften wird sich erst der volle Umfang der 'populären Literatur' erkennen lassen, mit ihrer Hülfe wird aber auch so manches sich aufklären, was für jetzt noch dunkel bleibt."

[4] Seckel, *op. cit.*, pp. 4-11, lists seventy-two editions. *Vocabularius Utriusque Juris* (Venetiis, 1564), 8°, in the present writer's library, might well not be the only additional edition not listed by Seckel.

[5] This entire literature still calls for evaluation from the viewpoint of language history; cf. Wolfgang Stammler, "Popularjurisprudenz und Sprachgeschichte im XV. Jahrhundert," in *Festschrift für Friedrich Kluge* (Tübingen, 1927), pp. 133-139.

II. *Vocabula Juris.*

Stintzing's and Seckel's scholarly contributions, although invaluable for subsequent researches, cover but one segment of the vast problem, "History of the Reception of the Roman Law." Their approach, exclusively from the Roman law, needs supplementation from the historical standpoint of those legal systems which were overwhelmed by, and had to give way to, the foreign law adopted. The task of uncovering the very beginnings of Roman-law penetration and influence is, however, particularly difficult. For the autochthonous law was overpowered and partly even covered up by the foreign law surging forward like an irresistible stream of lava. Nevertheless, minute investigations in all the pertinent law sources, in the legal literature, and particularly in the court decisions rendered during the period of transition, will to some extent disclose or at least indicate the early paths taken by this development.[6]

The infiltration of Roman-law concepts into medieval court practice, often not easily recognizable at first glance, is frequently indicated by the use of Roman legal terminology. *Termini technici* from the Roman (and Canon) law, such as *instrument,*[7] *testament,*[8] *testamentarii,*[9] *dilacion,*[10] *expens,*[11]

[6] For this purpose, the present writer endeavored for two full decades, from early 1915 until the end of 1934, to bring together all collections of Magdeburg Jury Court decisions still in existence for a legal-historical analysis and systematic survey; cf. Guido Kisch, "Magdeburg Jury Court Decisions as Sources of Jewry-Law," *Historia Judaica,* V (1943), 27-34, with bibliography. Only one volume, however, was published: G. Kisch, *Leipziger Schöffenspruchsammlung* (Leipzig, 1919) (hereafter referred to as *LSchSprS*). Shortly after the National-Socialist regime had established itself in Germany, this entire research project, then near its completion, was abruptly halted and had to be abandoned. All this writer's property was seized by the Nazi authorities and all the materials including the results of years of painstaking labors must be considered lost.

[7] Herrmann Wasserschleben, *Deutsche Rechtsquellen des Mittelalters* (Leipzig, 1892), no. 203, p. 66 (hereafter referred to as *DRQ*).

[8] *DRQ*, no. 362, p. 104; no. 363, p. 104; for more instances, see *LSchSprS, Register*, p. 614, *s.v.* Testament.

[9] *DRQ*, no. 362, p. 104; no. 364, p. 105.

[10] *LSchSprS*, no. 288, p. 223.

[11] *LSchSprS*, no. 22, p. 91.

exception,[12] and others, make their appearance in medieval jury court decisions, in the late fourteenth and fifteenth centuries.[13] Since the latter are written in the German language, the foreign expressions introduced must automatically arouse the student's attention. The novelty of that usage is, significantly enough, emphasized through the addition of the pertinent legal terms in German, patently for the purpose of explanation. Such typical combinations can be found as: *frist und dilacion,*[14] *testament oder seelgerete,*[15] *presumpcion und arger wan,*[16] *vorjarunge oder prescription,*[17] *citation adir vorheischunge,*[18] *expens adir gerichtskost,*[19] *prorogation und vorstreckunge,*[20] *privilegia und briefe,*[21] etc. True, the jurors at

[12] *LSchSprS,* no. 22, p. 91.

[13] The few examples cited could easily be multiplied. They are particularly numerous in a collection of decisions of the Jury Courts of Magdeburg and Liegnitz from the fifteenth and sixteenth centuries, apograph of which (by C. Joseph Schuchard, from the early eighteen-seventies) is in this writer's possession (hereafter referred to as *Liegnitz SchSpr*). The original decisions, missing in Liegnitz since 1895, must be considered lost; cf. Erich Liesegang, "Bericht über eine zur Herstellung eines Verzeichnisses der Magdeburger Schöffensprüche . . . im Jahre 1889 unternommene Reise," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (= *ZRG*), Germanistische Abteilung, XVI (1895), 293.

[14] *LSchSprS,* no. 35, p. 100.

[15] *LSchSprS,* no. 32, p. 97.

[16] *LSchSprS,* no. 19, p. 88 (*a.* 1472-1485).

[17] *LSchSprS,* no. 808, note 2, p. 566 (*a.* 1494).

[18] *Liegnitz SchSpr,* no. 54.

[19] *Ibidem* (note 18).

[20] *Liegnitz SchSpr,* no. 185.

[21] *DRQ,* no. 274, p. 86.—In Bohemia, similarly, the explanatory terms in Czech were added to the new designations of the Latin legal terminology; cf. Emil Ott, *Beiträge zur Rezeptionsgeschichte des römisch-kanonischen Prozesses in den böhmischen Ländern* (Leipzig, 1879), p. 142, note 26; see also *infra,* note 34.—The assertion has been made that the Roman-law terminology was, at times, merely intended to apply as more "modern" designation to related legal institutions of autochthonous provenance. "Es war das eben eine in der Strömung der Zeit liegende Verwendung einer Nomenklatur, die dem alten Dinge ein modernes Ansehen gab." So Gustav Aubin, "Der Einfluss der Rezeption des römischen Rechtes auf den deutschen Bauernstand,"

the "Supreme Court" of medieval Germany, the *Schöffenstuhl* in Magdeburg, knew only their municipal law and the traditional German law-books. They remained unperturbed by the Roman law, to which they would not submit voluntarily, throughout the existence of their *Oberhof*. Even in the sixteenth century, Roman law was not employed in their decisions. If, nevertheless, references to Roman law occur here and there, they were intended and used only as embellishing additions. These were taken, moreover, from the *Gloss* on the *Sachsenspiegel* rather than directly from the sources of Roman law.[22] On the other hand, even the *Schöffen* of Magdeburg in their decisions had to take cognizance of certain institutions of foreign provenience, then already known in Germany by their Roman-law designations, such as testaments or other legal "instruments."[23] This is as little surprising or disproving the aversion of the Magdeburg jurors against the Roman law, as the fact that established institutions of the Church or of Canon law were also mentioned in their judgments.[24] The situation of the *Schöffenstuhl* of Leipzig was different. It was somewhat irregular. From the beginning of the fifteenth century on (1409), namely, Leipzig was the seat of a university offering instruction in Canon and Roman law. And in the

in *Jahrbücher für Nationalökonomie und Statistik*, III. Folge, XLIV (1912), 738. This observation is sound. It is, however, as plausible that the adaptation of the old law to the adopted foreign legal system was not long in coming.

[22] For instances, see Otto Stobbe, *Geschichte der deutschen Rechtsquellen*, I (Braunschweig, 1860), p. 281 f., note 16; cf. also Guido Kisch, *Zur sächsischen Rechtsliteratur der Rezeptionszeit* (Beiträge zur Geschichte der Rezeption, ed. by G. Kisch, I, Leipzig, 1923), p. 21, note 1.

[23] See, e.g., *supra*, notes 7, 8, 9. Cf. also Richard Behrend, in *Göttingische Gelehrte Anzeigen*, CLXV (1903), 680 ff.

[24] Cf., e.g., *DRQ*, nos. 341 f., p. 99: *accolytus;* no. 343, p. 99: *vicarius;* Hermann Grössler, "Sammlung älterer nach Eisleben ergangener Rechtsbescheide des Magdeburgischen Schöppenstuhls," *Zeitschrift des Harzvereins für Geschichte und Altertumskunde*, XXIII (1890), no. 30, p. 191: ". . . der do eyn begebin man ist, so das her in dem orden ist, das dor heissen *canonici regulares;*" no. 36, p. 199: *convent und closter; LSchSprS*, nos. 336, 411: *paternoster.*

sixteenth century, the professors of law gained a dominating position in the *Schöffenstuhl* [25] which, therefore, must not be taken into consideration in this connection.

The provincial jury courts and the local courts, in contradistinction, were no less unacquainted with, and unfavorably disposed toward the Roman law as was the *Oberhof* of Magdeburg. In their case this attitude was certainly due, to some extent, to their ignorance of the Latin language.[26] In an interesting decision issued by the jury court of Dohna, about 1400 or somewhat later, one reads that "the plaintiffs and the municipal councillors (*Rathmanne*) of the city of Liegnitz could not understand the princely charter since it is in Latin." For this reason the defendant was ordered "to have the charter read in court, to have it translated into German, and interpreted, so that court as well as plaintiffs can understand it." [27] [28] It is evident that the translations of Roman-law

[25] G. Kisch (*supra*, note 22), *loc. cit.*

[26] In Germany, as is well known, Latin had been replaced by German in legal instruments, in laws, and law-books, from the first quarter of the thirteenth century onward; cf. G. Kisch, "Nationalism and Race in Mediaeval Law," in *Seminar*, I (1943), 61 f.; cf. Johannes Müller, *Quellenschriften und Geschichte des deutschsprachlichen Unterrichtes bis zur Mitte des 16. Jahrhunderts* (Gotha, 1882), pp. 312-314; L. Günther, *Recht und Sprache* (Berlin, 1898), pp. 151 ff., note 214; Karl Zeumer, "Ueber den verlorenen lateinischen Urtext des Sachsenspiegels," in *Festschrift Otto Gierke zum siebzigsten Geburtstag dargebracht von Schülern, Freunden und Verehrern* (Weimar, 1911), pp. 458 f.; Erich Keyser, "Lateinische und deutsche Verwaltungssprache im Deutschen Ordenslande," *Mitteilungen des Westpreussischen Geschichtsvereins*, XXVII (1928), 74-78.

[27] *Liegnitz SchSpr* (MS, *supra*, note 13), no. 208: "Hiruff sprechen wir manne zcu Donyn recht und wissen is nicht bessir: Sindmal daz der furstliche briff noch des gekowfften orteils laute gelegit und gelesen ist, und en dy cleger und rotmann der stad Legenitz nicht vornomen habin, alse her latinisch ist, und Peter Brawchatsch der antwerter erbotig ist, en dennoch lassen zcu lesen und nicht hogir begerit zcu suchin, wenn syn furstlich briff auswiset, etc.: Haben denn dy radmann den briff nicht vornomen, so sal en Peter den briff in gerichte lassen lesin, den deutin, und czu deutsche brengen, also das en das gerichte und ouch dy cleger vornemen mogen."—Cf. Georgius Thebesius, *Liegnitzische Jahrbücher*, ed. by Gottfried Balthasar Scharff, I (Jauer, 1733), 31; also Hugo Boehlau, *Nove Constitutiones Domini Alberti,*

terms in court and in court decisions, as well as the simultaneous use of Roman and German juridical terms, was a practice caused by the urgent necessity arising in the period of transition.

Yet despite the initial linguistic difficulty, it was the provincial municipal councils and local courts that, through secretaries (*Stadtschreiber*) or counselling jurists trained in Roman (and Canon) law—such as a Johannes of Brünn [29] or a Nicholas Wurm [30] —paved the way for the reception of Roman law in

d. i. der Landfriede vom Jahre 1235 mit der Glosse des Nicolaus Wurm (Weimar 1858), p. xxix, note 11.

[28] As late as 1554, insufficient knowledge of Roman legal terms allegedly caused mistaken decisions by the *Schöffen* of Leipzig as can be seen from a complaint submitted to the Prince Elector of Saxony: " . . . es unrichtigkeit und irthum zu vorhueten, etlichen erfahrenen rechtsvorstendigen aufs treulichst zu ubersehen und zu ercleren befehelen, auch die lateinischen worter darinne vorstentlich zu vordeutschen, dann sich aus itzigen unvorstand vielmals zutregt, das die schöppen zue Leipzig und das oberhofgerichte in allerlei fellen gleichwol zweierlei und also widerwertige urteil und recht sprechen. . . ." —Cf. Theodor Distel, " Die ältere Verfassungsgeschichte des Leipziger Schöppenstuhls," *ZRG*, German. Abt., VII (1886), 105.

[29] Johannes of Brünn (not of Gelnhausen, as was previously assumed), a *Stadtschreiber,* trained in Roman and Canon law, composed the *Brünner Schöffenbuch,* in the middle of the fourteenth century; cf. Emil Ott, " Das Eindringen des kanonischen Rechts, seine Lehre und wissenschaftliche Pflege in Böhmen und Mähren während des Mittelalters," *ZRG*, Kanonistische Abteilung, III (1913), 71 ff.; Gertrud Schubart-Fikentscher, " Das Brünner Schöffenbuch, Beiträge zur spätmittelalterlichen Rechts- und Kulturgeschichte," *Deutsches Archiv für Geschichte des Mittelalters,* I (1937), 457 ff.; M. Boháček, *Římské právní prvky v právní knize brněnské* (The Traits of Roman law in the law-book of Brünn; in Czech), in *Práce ze Semináře Českého Práva na Karlově Universitě,* Vol. IX (Prague, 1924); Boháček, " Ještě k římskoprávnímu obsahu brněnské právní knihy " (Additional Information on the Roman-Law Contents of the Brünn Law-Book; in Czech), in *Sborník prací z dějin práva československého,* I, *Práce ze Semináře Českého na Karlově Universitě,* XV (Prague, 1930), 39 ff. — On *Stadtschreiber* in Bohemian and Moravian towns equipped with knowledge of Roman and Canon law, see Ott, *Beiträge zur Rezeptionsgeschichte* (note 21, *supra*), pp. 73 ff., 174 ff.; Ott, " Das Eindringen des kanonischen Rechts . . .", *loc. cit.;* Bertold Bretholz, *Geschichte der Juden in Mähren im Mittelalter,* I (Brünn, 1934), 77.

[30] Nicholas Wurm, a pupil of Johannes de Lignano (died 1383) in Bologna (prior to 1377), and later influential in the legal life of the cities of Liegnitz and Görlitz in Silesia, revised the *Glosses* to *Sachsenspiegel* and *Sächsisches*

medieval court practice. In a medieval formulary, the *Stadtschreiber* once was called *oculus civitatis,* an appropriate characterization of the importance of these town clerks. Many of them were trained in the foreign law at Italian universities.[30a] From their ranks sprang the first authors in Germany who strove after the goal of harmonizing the autochthonous with Roman and Canon law.[31] And it is certainly no mere accident that the use of the Roman legal terms beside their German equivalents, as mentioned previously, occurs frequently in the records of disputes in the lower courts, which were dispatched for decision to the *Oberhof* of Magdeburg. Hence it was frequently due to the request for legal instruction from the provincial courts that terminology and institutions of Roman law, not taken from the *Gloss* on the *Sachsenspiegel,* could enter into the judiciary of the Magdeburg *Oberhof* and be mentioned in its decisions.

III. *Vocabularii Juris.*

It is little wonder then that in the course of development, when the Roman law was gradually gaining ground, a need was felt in juridical circles for brief lists or small collections of

Weichbild, and composed numerous law-books in a Romanizing manner; cf. Boehlau, *Nove Constitutiones Domini Alberti* (*supra,* note 27), pp. xxi ff.; for bibliography, G. Kisch, *Leipziger Schöffenspruchsammlung,* p. 87*, note 4.

[30a] On the training of medieval lawyers and the pedagogical methods and aids applied therefor, see Rudolf Limmer, *Bildungszustände und Bildungsideen des 13. Jahrhunderts* (Munich-Berlin, 1928), pp. 30-38.

[31] The most important pioneering work in this new method had already been done by Johannes von Buch, as early as 1305 a student of Roman law in Bologna, later a judge at the court of the Elector of Brandenburg, and author of the most popular *Gloss* on the *Sachsenspiegel* (*ca.* 1325). Strangely enough, no article on Johann von Buch is found in Wolfgang Stammler, *Die deutsche Literatur des Mittelalters, Verfasserlexikon* (Berlin-Leipzig, 1931 ff.). Cf., however, Claudius von Schwerin, *Grundzüge der deutschen Rechtsgeschichte* (Munich-Leipzig, 1934), p. 129; Emil Steffenhagen, "Die Entwicklung der Landrechtsglosse des Sachsenspiegels," XI: "Johann von Buch und die Accursische Glosse," in *Sitzungsberichte der philosophisch-historischen Klasse der kaiserlichen Akademie der Wissenschaften zu Wien,* Vol. CXCIV, Abhandlung 3 (1922); XII: "Johann von Buch und die kanonische Glosse," *ibidem,* Vol. CXCV, Abhandlung 1 (1923).

Roman lawterms, with short explanations of their meanings in German. It was the same phenomenon that can be observed in earlier centuries among Italian lawyers [32] and, later, in the course of the sixteenth century, among Czech jurists.[33] In both countries, necessity arisen from juridical practice instigated the composition of unilingual legal encyclopedias or bilingual vocabularies of law terms.

Such Latin-German legal vocabularies presenting the proper significance of the words were undoubtedly composed for practical use in several municipal chancelleries or courts. It seems, however, that very few of these important witnesses of a period of transition from the German to the Roman law system withstood and survived the impetus of later vocabularies, dictionaries, and encyclopedias which, shortly after the invention of printing, were disseminated in almost countless editions. All the more, scholarly attention from the point of view of legal history as well as of philology is deserved by one of the hand-written precursors of that vast literature of legal encyclopedias—a unique specimen of a bilingual vocabulary preserved in a manuscript in the Municipal Archives of Görlitz, Germany.[34]

[32] Cf. Heinrich Eduard Dirksen, *System der juristischen Lexicographie* (Leipzig, 1834), pp. 21-27, 36 f.

[33] In the course of the sixteenth century, when German legal language began to replace Czech, the necessity arose of translating the principal Czech law-books into German. Peter Sturba, *Stadtschreiber*, later councillor and judge in the Bohemian city of Kaaden, appended to his various law translations a collection of Czech law terms, each accompanied by a brief explanation in German. This *Explicatio Bohemicorum Vocabulorum* was published from manuscripts, by Jan Kapras, "Stěrbův výklad českých terminů právnických" (Sturba's Explanation of Czech Legal Terms; in Czech), in *Sborník věd právních a státních*, IX (1909), pp. 125-128.

[34] This vocabulary, consisting of two alphabetically arranged lists of legal terms, designated by this writer as *Vocabularius Juris Gorlicensis*, is published here for the first time from the manuscript, *infra*, chapter IV.—Another vocabulary, of a probably later date, is contained in the manuscript of the Municipal Library in Danzig, now no. 1834 (formerly XVIII C f. 112), which was not available to this writer; cf. Emil Steffenhagen, *Deutsche Rechtsquellen in Preussen vom XIII. bis zum XVI. Jahrhundert* (Leipzig, 1875), no. 19, p. 10:

It is no accident, as has been pointed out correctly, that jurisprudence frequently if not always began with philology. "The first legal scholars proper in the Middle Ages were philologists. They started from philology and treated the written law texts of the Roman Empire and the Church by the means of philology, and from there proceeded to jurisprudence." [35] This applies also to the reception of Roman law in Central Europe. Its adoption in legal practice was ushered in by a phase that could well be designated as the "philological" reception of Roman law. Its most primitive stage is marked by the noting and collecting of *termini technici* of the legal language in need of philological explanation and legal interpretation. For their elucidation, either the corresponding German law terms were given or their meaning was briefly described in German or Latin. At times simply a German translation of the term in question seemed sufficient. Characteristically enough, latinizations of typically German legal institutions occur interspersed among the Roman-law designations accompanied by the original terms; *e. g., gogravus, ein gogreffe.* The desire to bring Roman, Canon, and German law into concordance showed itself also in the making of such vocabularies. For convenience of usage the law terms explained were arranged in alphabetical order. All this is clearly indicated by, and observable in, the *Vocabularius Juris Gorlicensis.* No source that may have been available to the compiler of its first, specifically juridical, section is discoverable. It seems, however, that he consulted some manuscript litera-

"Erklärung lateinischer juristischer Kunstausdrücke;" Homeyer, *Die deutschen Rechtsbücher des Mittelalters* (*infra*, note 37), no. 259. — MS 12472 of the *Nationalbibliothek* in Vienna, from the middle of the fourteenth century, includes Roman law terms (fol. 2r), excerpts from Roman and Canon law (*ibid.* and fol. 238v), and land measurements in Latin and Czech; all this is unavailable for examination at present; cf. Gertrud Schubart-Fikentscher, "Neue Fälle zum Brünner Recht," *Deutsches Archiv für Geschichte des Mittelalters*, III (1939), 431 f., note. Cf. also Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter*, p. 18, note 49; Limmer, *Bildungszustände und Bildungsideen des 13. Jahrhunderts*, pp. 36 f.

[35] Karl von Amira, *Wie studiert man Rechtswissenschaft* ? (Munich, 1909), p. 9.

ture no longer ascertainable. For in a few instances the pertinent explanations, probably held for later insertion, are missing. Furthermore, some of the translations or explanations found in the second section of the Görlitz Vocabulary are identical with those in a manuscript vocabularly of Mayence.[36]

To the same group as the *Vocabularius Gorlicensis* there belong two vocabularies derived from late Latin translations of the *Sachsenspiegel,* namely the *Vocabula Collecta ex Latino Speculi Saxonum,* and the so-called *Vocabularius Arra.*[37] Appearing already in the earliest printed editions of the *Sachsenspiegel,* these vocabularies became a permanent companion of the Saxon law-book. The existence of numerous reprints in different editions bespeaks wide circulation. Even if no reference had been made there to the *Gloss* to the *Sachsenpiegel,* it would be safe to assume that these vocabularies also lent some aid to the reception of the Roman law. The *Vocabularius Arra* does not always give translations or the equivalent terms from German law but sometimes merely refers to the pertinent passages in the *Sachsenpiegel,* as was the custom in the vast literature of the so-called *Remissoria* or *Repertoria.* The *Vocabularius Arra* thus exhibits a mixed character, being partly a vocabulary, partly a *Remissorium.*[38] It probably

[36] They are marked with asterisks in the text, reproduced *infra,* ch. IV.— In searching for the hypothetical source of the first section of the *Vocabularius Juris Gorlicensis,* this writer examined the following manuscripts of the University Library in Leipzig containing some juridical works related in character: MSS 158, 1244, 1478, 1667; cf. R. Helssig, *Katalog der lateinischen und deutschen Handschriften der Universitäts-Bibliothek zu Leipzig,* Vol. III: "Die juristischen Handschriften" (Leipzig, 1905), Anhang. No relationship, however, could be established. When, as here, systematic research fails, mere chance may well lead to the discovery of the source, some time in the future.

[37] Guido Kisch, "Zwei Sachsenspiegel-Vokabularien," *ZRG,* German. Abt., XLIV (1924), 307-315. Their texts are also reproduced, *loc. cit.* Merely a summary reference to this article but no new material is found in Gustav Homeyer, *Die deutschen Rechtsbücher des Mittelalters und ihre Handschriften,* 3rd ed. by C. Borchling, K. A. Eckhardt, and J. Gierke (Weimar, 1931/34), pp. 57* f.; cf., however, 2nd ed. (Berlin, 1856), p. 62. Homeyer searched in vain for manuscript vocabularies of the type under consideration.

[38] On *Remissoria* in general, see Homeyer, *op. cit.,* 2nd ed., pp. 57-61; 3rd ed., p. 57*; Erika Sinauer, *Der Schlüssel des sächsischen Landrechts* (Breslau,

originated from casual notes and references taken down by a student of the *Sachsenpiegel.* A similar but more systematic approach betrays itself in lists that explain in German the grades and designations of affinity in Johannes Andreae's famous work, *Lectura super arboribus consanguinitatis et affinitatis,* which enjoyed a very wide circulation in Central Europe. Such *Vocabula quae ponuntur in Arbore Consanguinitatis* were appended to a number of editions of the *Lectura* but occur also in manuscript form.[39]

As has been pointed out previously, German juridical lexicography of the Middle Ages had its predecessors and possibly some models in the juridical literature of medieval Italy. Up to the twelfth century juridical vocabularies in alphabetical order are missing, specifically among the Glossators of Roman as well as Canon law. In the thirteenth and fourteenth centuries, however, studies in juridical dogmatics were combined with investigations into legal terminology. Henceforward all thorough research in the field of juristic terminology was based on a preparatory examination of substance and terms in the law sources, whose historical and dogmatical study was, in turn, conditioned by a proper inquiry into legal terminology.[40] Even a direct influence of the Bolognese

1928). In spite of Sinauer's contention to the contrary (pp. 188 f.), it is clear that, as a rule, the *Remissoria* were not intended to replace the law-books, but merely to facilitate their use, just as was the case with the vocabularies; cf. Homeyer, *Des Sachsenspiegels Erster Teil oder das Sächsische Landrecht,* 3rd ed. (Berlin, 1861), pp. 116 f.; G. Kisch, "Zwei Sachsenspiegel-Vokabularien" (*supra,* note 37), p. 311.

[39] For details, see R. Stintzing, *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland,* pp. 162-165; cf. also Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter,* p. 283, MS Giessen 747, *sub* no. 2. Related in nature are the unpublished *Vocabula* in MS Berlin, Preussische Staatsbibliothek, *Mgf.* 1094, Homeyer, *Die deutschen Rechtsbücher des Mittelalters,* no. 100, beginning thus: "Nota: Patruus patris frater; amita patris soror."

[40] A remarkable example deserving mention is Albericus de Rosciate (died 1354), *Dictionarium juris utriusque,* composed between *ca.* 1335 and 1354; cf. Dirksen, *System der juristischen Lexicographie,* p. 36; Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter,* pp. 193 ff., 196. — For explanatory vocabularies on collections of Canon law, see Seckel, *op. cit.,* p. 196, notes 161, 163.

school on the methodology of the Romanizing lawyers in Central Europe is distinctly traceable. It is the aforementioned Nicholas Wurm who, in his work *Blume des Sachsenpiegels*, still unpublished, faithfully imitated the juridical-philological method of his Bolognese master, Johannes de Lignano.[41] At the beginning of his juridical discourses he usually places etymological explanations of the legal terms involved. To illustrate his method, his comments on the legal terms and institutions of *hereditas* and *parafernalia* may here be quoted from his *Blume des Sachsenpiegels*.[42]

XI, 1, 3:

Hereditas heist ein erbe, und ist eine volge in alle daz gut, daz mit eim bestirbet; und hereditas kumet von einem latinischen worte unde heist *herus*, und *herus* heist ein herr. Wen worum ? Dorvon komt *heres* und heist ein erbeling und heist dorum so *quasi heri filius vel filia*, daz ist . . . und erbe alz irerbeitet. Und heist auch herwe; wen worum ? her mus sich ofte we thun, ee her irerbeit und lest iz denne mit bittircheit.

XI, 1, 8:

Ir sult eigentlichin merken, daz dy wort alz *parafernalia, expeditorialia, comestualia*, sint, nach der grammaticam czu nemen, nomina etroclita und sint tercie declinationis, pluralis numeri tantum. Nach der loyca czu nemen, so sint iz *termini universales, qui predicantur de pluribus differentibus numero et specie*.—Wen worum?—Iz ist manchirhande, daz czu dem herwete gehoret, noch manchirhande ist, daz czu der gerade gehort, und dorum ist mit einem worte alliz begriffen.

Such were the ways of juridical etymology in Germany in the period of the reception of Roman law. The harmonization of German and Roman legal institutions was to take its point of departure from their harmonization in etymology. Hence such derivations as *hereditas—herus—herwe—erbe*.

It is not surprising that in the juridical-philological atmosphere of the fourteenth and fifteenth centuries the old and often used pedagogical device of metrical composition in "verse" was employed in order to make teaching and study of Roman law-terms, along with their German translation or

41 Cf. *supra*, note 30.

42 Excerpts published from the manuscript, in Boehlau, *Nove Constitutiones Domini Alberti*, p. xxxii.

equivalent, easy and popular. Johann von Buch's *Gloss* to the *Sachsenpiegel*, I, 3, offers the following *versus memoriales*,[42a] evidently going back to some model in the literature of Canon law:

> Uppe dat du dy saken alle wetest, so hebbe desse versch:
> Error, conditio, votum, cognatio, crimen,
> Cultus disparitas, vis, ordo, ligamen, honestas,
> Si sis affinis vel si coire nequibis:
> Haec socianda vetant, connubia juncta retractant.

The same tendency underlay the *Juristarum Termini Metrice* already found in late-fourteenth century manuscripts and later appended to some editions of the work, *Elucidarius carminum et historiarum vel Vocabularius poeticus, continens historias, provincias, urbes, insulas, fluvios et montes illustres*, composed for school use by Hermannus Torrentinus of Zwolle, Holland (died in 1520).[43] These "hexameters" of an outspokenly didactical nature are reprinted in the Appendix. They seem neither to be derived from, nor to have an immediate or close connection with, the *Vocabularium quod Gemma Gemmarum vocatur*.[44] However, it is also characteristic of the

[42a] *Gloss* to *Sachsenspiegel*, Landrecht, I 3; ed. Augsburg, 1516, fol. VIIIv; ed. by Christoff Zobel (Leipzig, 1560), fol. XXv.

[43] B. J. L. de Geer, "Juristarum Termini van Hermanus Torrentinus," in *Nieuwe Bijdragen voor Regtsgeleerdheid en Wetgeving*, XX (1870), 1-27; Hugo Boehlau, "Juristarum Termini, ein Stück populärer Rechtsliteratur aus dem Anfang des 16. Jahrhunderts," *ZRG*, X (1872), 313 f.; Eberhard Freiherr von Künssberg, "Rechtsverse," *Neue Heidelberger Jahrbücher 1933* (Heidelberg, 1933), pp. 103, 159 f. (text), 90, 92, 104. The most scholarly treatment of the *Juristarum Termini*, from the point of view of philology, is that by J. Zacher, "Die Nomina Volucrum und die Termini Juristarum," *Zeitschrift für deutsche Philologie*, XI (1880), 317-324; with literary bibliography, p. 318, and a list of the exstant manuscripts, pp. 318-320.—On medieval vocabularies composed in hexameters, see Wilhelm Wackernagel, "Geschichte des deutschen Hexameters und Pentameters bis auf Klopstock," in his *Kleinere Schriften*, II (Leipzig, 1873), pp. 21 ff., 31 ff.

[44] A hypothesis to the contrary was set forth by B. J. L. de Geer, *loc. cit.*, pp. 1 ff.; cf. also Wilhelm Wackernagel, "Geschichte des deutschen Hexameters und Pentameters," p. 31, n. 30. To support the assertion in the text, *supra*, a few comparative instances may be noted here, selected at random

period that the author of one of the most frequently reprinted and widely disseminated general vocabularies, the *Vocabularius Rerum*,[45] Wenceslaus Brack, deemed it appropriate to in-

from the *Vocabularius Gemma Gemmarum*, edition Argentinae, 1514, in the present author's library. They are compared with the *versio vulgata* of the *Juristarum Termini*; cf. *infra*, note 57.

Juristarum Termini:	*Vocabularius Gemma Gemmarum:*
ungelt angaria	Etiam angaria dicitur *ungelt oder zwanck*, compulsio, injusta coactio
inlag obstagium	obstagia *ein leistung, birgschafft*
emologium *wedde*	(missing)
mercipotus *wijnkauff*	mercipotus *ein winkauff*
arrestare *frenen*	arrestare *bekummern oder pfenden*
hereditarium *erbgut*	hereditarius, -a, -um ad hereditatem pertinens, *ein erb*; heredium, id est, predium *ein erbe oder erbgut*
ducatus *geleytte*	(missing; only:) ducatus *hertzogtum*

On the *Vocabularius Gemma Gemmarum*, see Johannes Müller, *Quellenschriften und Geschichte des deutschsprachlichen Unterrichts* (*supra*, note 26), p. 206 and note 35; also Alfred Herr, "Zur Geschichte der Egerer Gymnasialbibliothek im 16. Jahrhundert," *Mitteilungen des Vereines für Geschichte der Deutschen in Böhmen*, LIII (Prague, 1915), 264.

[45] On Brack's *Vocabularius Rerum*, composed about 1449 (the first dated edition printed in 1478 in Augsburg, later often reprinted; no less than fourteen editions prior to 1500), see J. Zacher, *op. cit.* (*supra*, note 43), p. 318; Johannes Müller, *op. cit.* (*supra*, note 26), p. 206, note 34. I used the edition Argentine, 1512, in my library.—On Latin-German vocabularies (until the sixteenth century), in general, see Johannes Müller, pp. 204-206, with bibliography. —There is still very much to be done on the history of medieval lexicography in all fields including legal history. The extremely scanty literature on philological, theological, and medical vocabularies is listed in Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter*, p. 192 f., note 142. Jacob Grimm, in his Introduction to Jacob Grimm and Wilhelm Grimm, *Deutsches Wörterbuch*, I (Leipzig, 1854), p. xx, deplored the scantiness of medieval dictionaries and somewhat underestimated their literary value. He wrote: "Es sind nichts als kleine Glossare, Vocabulare und Nomenclatoren, meist nach den lateinischen Wörten alphabetisch und ungenau, zuweilen auch nach Unterscheidung der Gegenstände geordnet." Wilhelm Wackernagel, on the contrary, fully recognized the great importance of the medieval vocabularies for research. In the Preface to his edition of the *Vocabularius Optimus* (Basel, 1847), p. 6, he described their significance thus: "Denn gerade diese lateinisch-deutschen Realglossarien, so wenig Berücksichtigung auch der neueste Herausgeber des Du Cange ihnen hat angedeihen lassen, sind eine Fundgrube der mittel-

clude in his work three relatively large groups of legal terms under the headings *Loca penalia, Ad judices spectantia,* and *Instrumenta legalia.* In these sections of his vocabulary Brack largely leans upon the corresponding sections in the so-called *Vocabularius Optimus* which was composed as early as the fourteenth century.[46] There can be no doubt of Brack's depending on the *Vocabularius Optimus.* The fact that he was prompted to enlarge the pertinent sections by adding a considerable number of terms from Roman law is witness enough for the progress of its conquest.[47] If, on the other

lateinischen Lexicographie, der an Reichtum weder die historische noch die theologische Literatur noch gar die Gedichte des Mittelalters nahe kommen, und die selbst von den Rechtsurkunden kaum übertroffen wird." At present, the best survey and a brief history of medieval vocabularies are found in Laurentius Diefenbach, *Glossarium Latino-Germanicum Mediae et Infimae Aetatis, Supplementum Lexici Mediae et Infimae Latinitatis* conditi a Carolo Dufresne Domino Ducange (Francofurti ad Moenum, 1857), pp. viii ff., including a list of Latin-German vocabularies in manuscripts and early prints, on pp. xiii-xxi; and in Diefenbach, *Novum Glossarium Latino-Germanicum* (Francofurti a.M., 1867), pp. vii-xxiii; however, no juridical vocabulary or glossary was used by Diefenbach. Cf., in addition to Johannes Müller, *op. cit.*, pp. 204-206, also Hermann Paul, *Grundriss der germanischen Philologie*, I, 2nd ed. (Strasbourg, 1901), 23 f.; Gustav Ehrismann, *Geschichte der deutschen Literatur bis zum Ausgang des Mittelalters*, II. Teil, Schlussband (Munich, 1935), p. 441. No bibliography is appended to the brief articles in Karl Löffler and Joachim Kirchner, *Lexikon des gesamten Buchwesens*, III (Leipzig, 1937), 525, s.v. "Vocabularii", and II (1936), 334, s.v. "Lexikon". A systematic search through printed and unpublished catalogues of manuscript collections will bring much valuable material to light well deserving of scholarly treatment; cf., *e.g.*, Otto Günther, *Katalog der Handschriften der Danziger Stadtbibliothek*, III (Danzig, 1909), 280 ff.

[46] Wilhelm Wackernagel's edition, *Vocabularius Optimus* (Basel, 1847), must be considered as antiquated today. The above-mentioned sections from the *Vocabularius Optimus* and Brack's *Vocabularius Rerum* are reproduced in the Appendix. Their comparison will prove the thesis propounded in the text, *supra.*

[47] The latter could be studied in detail only on the basis of a careful comparison of the extant manuscripts and successive editions of Brack's *Vocabularius.* The present writer was not in a position to use such because the incunabula in the New York libraries are stored away for safety for the duration of the war. The same is to be said about an as yet not analyzed manuscript, *Vocabularius Latino-Teutonicus*, of 1463, 246 folios, in possession of the Union Theological Seminary in New York City; cf. Seymour de Ricci and W. J. Wilson, *Census of Medieval and Renaissance Manuscripts in the United States and Canada*, II (Washington, 1937), 1643, no. 24.

hand, Roman-law terms such as *parricida* and *culleus*[48] are found in close connection even in the *Vocabularius Optimus*,[49] it is clear that already in the course of the fourteenth century Roman legal ideas and institutions had made headway in Central Europe.

It would be a considerable task in itself, gratifying, though arduous, to inquire into the vast *Nomenclator* literature[50] with regard to its role in explaining and disseminating Roman-law terms and, thereby, to disclose the furtherance which the reception of Roman law received from popular dictionaries and encyclopedias. This object, however, lies outside the scope of the present essay. Its aim has been merely to fill a gap in the early history of the "practical" reception of Roman law in Europe from unpublished manuscript material. Perhaps it will invite the attention of competent philologians. The early bilingual vocabularies served partly as dictionaries, partly as legal encyclopedias. In them, we have brought to light some precursors[51] of the most powerful in-

[48] On the *poena cullei* as the special punishment of *parricidium* in Roman law, see *Dig.* 48, 9, 9; *Inst.* 4, 18, 6; Joannes de Solorzano Pereira, "De parricidii crimine disputatio," appended to his *De Indiarum Jure*, I (Lugduni, 1672). On the influence of the Roman *poena cullei* in medieval German law, see Guido Kisch, "The 'Jewish Execution' in Mediaeval Germany," *Historia Judaica*, V (1943), 115-118.

[49] Wackernagel, *Vocabularius Optimus*, p. 33, section XXV; reprinted also *infra*, in the Appendix.

[50] No specific study on this literature in general has come to the attention of this writer; cf. only, Johannes Müller, *op. cit.*, pp. 227 ff.—Hadrianus Junius Medicus, *Nomenclator omnium rerum* (Francofurti, 1620) includes no special section of law terms but offers, in its introductory catalogue of authors, *Auctorum tum veterum, tum recentiorum Catalogus*, a list of Roman *jurisconsulti* mentioned in the Digest.—Ahasverus Fritsch, *Supplementum Speidelio-Besoldianum notabilium verborum, rerum, antiquitatum, clausularum et terminorum juridico-politicorum* (Jena, 1674) is not available in this country.

[51] Another legal vocabulary of the fifteenth century is still unpublished. It is entitled *Vocabula juris provincialis et feodalis*, with explanations in Latin and Polish, contained in MS 284 of the Municipal Archives in Przemysl, Poland. An apograph is in this writer's possession and will serve as basis for an intended edition, to be published in the near future. For the time being, see on this vocabulary, Emil Kalužniacki, "Die polnische Rezension der Magdeburger Urteile und die einschlägigen deutschen, lateinischen und cze-

strument that for centuries met a need of lawyers and laymen and even stimulated the speculation of publishers and booksellers: the *Vocabularius Juris Utriusque*,[52] without which the reception of Roman law would never have been accomplished,[53] and which must be regarded as the coping-stone in medieval legal lexicography.

IV. *Vocabularius Juris Gorlicensis.*[54]

Secuntur Vocabula Juris [55]

1

1	Parafernalia	heyssit gerade
2	antiferna	eyn gifft addir eyn leipgedinge addir ein eegelt; hoc idem significat dos vel dotalicium vel donacio propter nupcias
3	sponsalis largitas	eyn morgengabe
4	arra	heyssit eyn molschatcz
5	accio civilis	eyne borgliche clage
6	accio criminalis	eyne peynliche clage
7	arbitratores, arbitri et amicabiles compositores	idem significant: sonleute; inde arbitrium et composicio id est sune. Nota: arbiter heyssit auch eyn entscheidter eynner sache addir eynn richter, zcu deme eyne sache wirt gesaczt

1 Paranafernalia *ms.*

chischen Sammlungen," *Sitzungsberichte der philosophisch-historischen Klasse der kaiserlichen Akademie der Wissenschaften zu Wien,* CXI (1886), 222; G. Kisch, "Zwei Sachsenspiegel-Vokabularien" (*supra,* note 37), p. 307 f., note 3; p. 310, note 2.

[52] It is very significant of the path taken by the development of the reception of Roman law in Germany that, in the sixteenth century, vocabularies of ancient *German* law terms no longer understandable were appended to the editions of German law-books, such as Christophorus Zobel's and Nicolaus Wolrab's editions of the *Sechsisch Weichbild, Lehenrecht und Remissorium,* e.g., in the edition by Wolrab (Budissin and Marsburg, 1557), following the Register: "Volget hernach ein Register der unvernemlichen alten vocabulen, so hin und wider im Sachsenrechten befunden, welche nun eigentlich und möglichs fleis gedeut und ausgeleget sind, damit der verstandt der texte bisweilen dem leser deste leichter werde." Homeyer's (*Die deutschen Rechtsbücher des Mittelalters,* 2nd ed., 1856, p. 62) query as to whether such vocabularies survived in manuscripts, has remained as yet unanswered.

[53] Thus Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter,* p. 472. For the *Nachgeschichte* of the *Vocabularius Juris Utriusque,* see Seckel, *op. cit.,* pp. 472-482.

8	increpare vel appellare	heysset ortil scheldin
9	agere	id est clagen; inde accio, id est, clage
10	arrestare	hindern
11	bannus regalis	konniges ban addir ding
12	blasphemia	eynne lesterunge
13	caucio fideiussoria	quia fideiussore perficitur
14	caucio iuratoria	quia iuramento perficitur
15	caucio pignoratoria	quia pignore perficitur
16	censitus	eyn zcinssman
17	contumelia	
18	depositarius	heyst der, zcu dem ein ding yngeleyt wirt; sed depositor ist der, der ein ding inlegit
19	discrepare	zween
20	devolucio	aneval noch tode
21	emenda vel multa	est in causis civilibus, et dicitur eyn wette; sed pena est in criminalibus casibus, et dicitur eyne busse adir eyn vordynte pein
22	equanimus	id est equaliter natus
23	expeditoria res vel expedicio-•nalia	eyn hergewette
24	ferendarius vel praelocutor	eyn vorspreche; sed procurator in iure
25	fidefragus	ein traulosser; sed iurelegus eyn rechtlozer

17 *terminus Germanicus omissus in ms.*

21 multa eyn gewette, *addidit manus recentior, in margine ms.*

[54] Codex *Varia 4,* Municipal Archives of Görlitz, Germany, fol. 260v-261v. For a detailed description of this manuscript and a legal-historical analysis of its contents, see Kisch, "Schöffenspruchsammlungen," *ZRG,* Germanistische Abteilung, XXXIX (1918), 348-365 (supplemented *ibidem,* XL [1919], 284); with bibliography on p. 348, note 2, to which the following references should be added: G. Kisch, *Leipziger Schöffenspruchsammlung,* pp. 57*-63*, and *passim;* Richard Jecht, "Weitere Forschungen zu den Görlitzer Sachsenrechtshandschriften," *Neues Lausitzisches Magazin,* XCV (1919), 104-107; G. Kisch, *Zur sächsischen Rechtsliteratur der Rezeptionszeit* (*supra,* note 22).

[55] In reproducing the text of the Görlitz Vocabulary the spelling of the original has been followed minutely. Only for the sake of readier intelligibility the Latin *u* was substituted by *v* (e.g., *vel* instead of the original *uel*) and the German *w* by *u* (e.g., *leute* instead of lewte). Every other deviation is indicated in a footnote. Punctuation has been added to clarify the text and, to assist the reader in understanding the contents, each term has been placed on a separate line. The division into paragraphs has its basis in the original manuscript, where embellished capital letters were used by the scribe to indicate the beginning of a new paragraph or explanation.

26	fronisare	est officium preconis, id est frone wlgariter
27	gogravus	eyn gogreffe; pedaneus ein burgermeyster; ordinarius iudex eyn beleent richter
28	iurisdiccio	eyn gerichte
29	iudicium contestatum vel bannitum	eyn gehegit ding
30	ius gencium, ius iurense vel ius plebiscitum	
31	ius civile vel nupciale	
32	incumbere in fallaci vel influere in iura	ein ungerichte
33	ipoteca, -ce	dicuntur illa bona, que aliquis possidet, que ullo alieno sunt obligata nec per aliquem alienum arrestata
34	legittima necessitas	eyn echte nod; et sunt quatuor: infirmitas, captivitas, peregrinacio, et publica expedicio
35	mortes, neces	proveniunt ex egritudinibus; sed strages et cedes veniunt ex interfeccionibus
36	monomachia	
37	manutenere	id est, handeln; inde: mancipati, id est, capti; sed emancipati, id est, manu missi vel alio nomine abegesundert
38	pleniuris	vollkomen an seynem rechte
39	pretor, prefectus, iudex	idem significant
40	pretorium	
41	pagus vel paga	id est, villa; inde pagani et villani, id est, dorffer vel lanndsessin
42	retractare	irholen
43	refundere, resarcire	heysset schaden widerkeren
44	repetere	id est, fordern; impetere ansprechin; prepetere, id est, vorsprechin
45	rennuere	id est, spernere
46	registrales	id est, salarium registracionum, imprimis notarii

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29 iudicium contestatum eynn geheget dingk, *addidit manus recentior, in margine ms.*

30 iurense, *sic in ms.; termini Germanici omissi in ms.; explanationes similiter.*

31 *explanatio omissa in ms.*

36 *explanatio omissa in ms.*

40 *explanatio omissa in ms.*

41 milla, *ms.*

46 solarium, *ms.*

47	stragicendium	id est, mortbrannd; a strages, quod significat interfecciones, et incendium
48	semestre tempus	est tempus sex ebdomadarum cum uno die
49	secus	id est, si non vel aliter
50	succumbere	underlegin
51	sacramenta vel iuramenta	idem significat
52	stipulacio et obligacio	idem sunt, id est, vorbindunge
53	titubans	eyn stammender
54	transaccio	
55	worandare	id est, offhaldin
56	warandare	id est, gewerin
57	vendicare	buten
58	violencia	gewalt adir fredebroch
59	excentrum	dicitur illa pecunia, quam captivus dat pro sua liberacione; et dicitur, quia extra condicere positum, ut volo dare ne magis ledar.

2 [56]

1	Comprehensor	begriffer vel gebrucher gotes
2	cenopheia	laubruss
3	causa efficiens	orkunde sache
4	causa formalis	gestetliche sache
5	*confundere	id est, zcusamene fugen
6	consensualis	gleich wesende
7	centrum	mittenheit
8	circumstrepetus	beslossen
9	circumstancie	ummestentnis adir beswerunge

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54 *explanatio omissa in ms.*

56 warandare gewerenn, *addidit manus recentior, in margine ms.*

59 excentrum, *lectio incerta.*

6 consensualis, *lectio incerta.*

[56] In the manuscript, the text continues uninterruptedly. The begining of a new alphabet, however, justifies separation of the following from the preceding vocabulary.—The words marked with one asterisk are found with an identical or very similar explanation in the *Vocabularius Rerum*, MS 602 (previously no. 322), of the early fifteenth century or even earlier, in the Municipal Library of Mayence, Germany; the words marked with two asterisks occur with an identical or very similar explanation in a manuscript vocabulary, appended to the aforementioned *Vocabularius Rerum* of Mayence. Even during the present author's stay in Europe this manuscript was not made available to him. Therefore he had to content himself with a collation of each word in the following vocabulary with Diefenbach's *Glossarium Latino-Germanicum Mediae et Infimae Aetatis* (*supra*, note 45), where the terms from the Mayence manuscripts are included. For a description of these manuscripts, see Diefenbach, *op. cit.*, p. xiv, no. 9 and 9 Anh.

10	contiguum	beweysende undirscheidunge
11	concilium	
12	*cruenta bestia	grulich thyr
13	**concavum	ingebogen
14	**convexum	aussgebogen
15	colar	hitzig blut
16	concomitancia	wezelich nochvolgunge
17	**duracio	werhafftikeit
18	dimensio	
19	defectuosus	henefellig
20	dragma, -me	id est, pondus
21	*effectus	geworchte
22	exbrigare	antworten
23	equivoce	id est, gemeyner name manch dinge
24	**etrogenia	ungleicher naturen; **homogenia gleicher naturen
25	*enigma	gleichniss
26	**figura	gesteltnis
27	*finis intencionis	die letzte meynunge
28	fantasia	bildende crafft
29	**gratuita	gemenunge gotis
30	infinitum	grundeloze unendikeyt
31	inmensum	unmesig
32	*incuria	unruchlosigkeit
33	**intensive	inneteilichen; extensive aussteilichen adir manchveldiglich
34	**lex eterna	ewig gesetcze
35	limitatum	vorbunden
36	organum	gledemoss
37	precepta cerimonalia	sunderliche gewonheit
38	precepta iudicialia	beschrebin ortil
39	**proporcio	ebinmessig
40	*propiciatorium	yn der antwort der genadin gotis
41	quando putatum	underscheydunge der czeyt
41	**racio premordialis	eyne ewige sache zcu creaturen
42	*racio seminalis	naturliches somen ausweyseliche crafft mancherley zcu brengen
43	regula	gemeyn recht

---

11 conci^{m}, *ms., lectio incerta.*

13, 14 *manus recentior iteravit in margine ms.*

18 *explanatio omissa in ms.;* leibes gröss vel leyplich gross, *ms. Mayence 9 Anh.*

22 entwerren, *ms. Mayence 9.*

28 eyn selb komende ynbildunge, *ms. Mayence 9 Anh.*

29 genadunge gotis, *ms. Mayence 9 Anh.*

44	situs putatum	bewegunge der stad adir ausweysunge
45	sacrilegium	kirchraub
46	**suffragium	vorbytende hulffe
47	status patrie	heymelich lebin
48	status vie	enelende lebin
49	scrupulus	dubitacio
50	*transmigracio	obirfarunge
51	*testamentum	letczte globde
52	typus	vorspel vor rechen
53	viator	wegevertig
54	*universale	vornemelich gemeynkeyt aller dinge
55	univoce	eyn gemeyne gleichname
56	*vestigium universi	eyn nochspor gotis in allen dingenn
57	*sensus scripture	auslegunge der schrifft
58	*allegoria	von der christenheit
59	*anogoria	vonn heiligen dingen
60	historia	schrifftlich seen; utraque de Ierusalem: est enim historiace civitas, allegorice christianitas, tropoloice quevis beata anima, annogoryce futura patria.

V. *Appendix.*

1. Juristarum Termini [57]

Multi doctores errare solent aliquando.
Est pheodus *lenghut*, sed depactatio *dingnisse*,
Et pactus sit *pacht*, census *tyns*, redditus *inghelt*
Vnghelt angaria, post hec precaria *bede*,
Inleggher obstagium, teolonium *tol*, exaccio sit *schot*,

---

52 worczeichunge vel beyspel, *ms. Mayence 9.*

57–60 For history, allegory, and tropology as the three methods of Scripture exposition, cf. William M. Green, "Hugo of St. Victor, *De Tribus Maximis Circumstantiis Gestorum*," *Speculum*, XVIII (1943), p. 484 and note 4.

4 l. telonium

[57] Codex No. 1348, fifteenth century, about 1451, of the Paulinian Library, now University Library, Leipzig, Germany, fol. 224r-v. For a detailed description of this manuscript, see J. Zacher (*supra*, note 43), pp. 313 f. Its textual transmission of the *Termini Juristarum* differs considerably from the *versio vulgata* as reproduced by de Geer, Boehlau, and von Künssberg (see *supra*, note 43). As the latter is easily available in several printings, the version of the Leipzig manuscript found only in an obscure place has been chosen for republication here. The text was reproduced after Zacher's edition, *loc. cit.*, pp. 320-324. His detailed philological and historical explanations and comments were omitted; only textual corrections were retained and included in the footnotes.

Redagium *wagentol*, sed pedagium sit tibi *voettol*,
Est dothalitium *lifgedink*, sit impignoratio *pandinghe*,
Heruart expedicio, sit vandicatio *butynghe*,
Brant est incendium, spolium *roſ*, *deverie*que furtum.
Omagium *manscop*, sed dic dominium *herscop*,
Vectigal *voerloen*, sed naulum sit tibi *schiplon*,
Ortiganum *gardelon*, sed branium sit tibi *wiclon*,
Sit scortum *mynnelon*, precium *schiltlon* tibi signat.
Stokken cippare, *beschatten* expecuniare,
Monere *manen*, dic expagare *betalen*,
Dic *vanghen* captare, dic *upholden* detinere,
Anverdighen invadere, dic intricare *bewerren*,
Bescheiden assignat, *bedreghen* autem defraudat.
Vmmevaen amplector, sed suffrocare *vorworden*,
Vtpanden extorquet, *upgheuen* autem resignat.
Twierstrid duellum, *solt* stipendium tibi signat.
Dic duco *leyden*, ducatus sit tibi *gheleide*,
Mercipotus *wincop*, sit homicidium *manslacht*,
Weslinghe sit cambium, sed mercimonia *kopenschop*.
Impetit dic *anspreken*, repetit *vorderen* tibi signat,
Consequi dic *volghen*, *besitten* dic possidere,
Thoherden instigare, *ghebeden* imperat tibi signat.
Braden assare, dic *villen* excoriare,
Vlomen exsquamat, *vtweiden* euiscero signat,
Caken excoquere, *garmaken* dic elixare,
Palmitat dic *hulden*, dic *bekummeren* arrestare,
Corripere *straffen*, dic indulgere *vorgheuen*,
Plucken deplumat, *vorsenghen* exustulat,
Passagium *bedeuart*, sallarium *solt* tibi signat,
Arra dic *trueschat*, *snaue* dic cespitat,
Decima sit *tegede*, pactus *pacht*, pugil *endeghe*,
Dic lucar *heydeghelt*, heriditarium *erfghut*.
Vpholt arandat, *beweren* dico warandat.
Vorkoepp sosorrat, hesito semper dubium dat.

---

7 l. vendicatio

9 *manscop*] *lantrech huldinghe* suprascriptum.

12 *schiltlon*] *sichtlon* suprascriptum; l. *sichtlon*.

17 defraudat] paralogitat suprascriptum.

18 l. suffocare, *erworgen*.

19 l. *upgeven* autem.

24 impetit] correctum in ms. ex impedit, repetit ex repedit.

30 *bekummeren*] *anveyden* suprascriptum.

34 *trueschat*] *brutschat* suprascriptum;
cespitat] reduplicat suprascriptum.

37–38 manus recentior addidit.

38 sosorrat] foforrat? feferrat? lectio incerta.

2. Vocabularius Optimus.[58]

XXIV.

De punientibus et puniendis et penis secundum leges.

Lictor, carnifex	henker
predo, raptor	rouber
vispilio	buobe
pirata	merrouber
abieus	rindertieb, schinder
latro	morder
fur, clepus	diep
carcer	kerchel
catena	kettenn
cippus	diepstock
pedica, conpes, boya	ein beie ader ein isenhalte
manica	armring
columbar	halsring. Adde columbar avi collo rede quoque navi
flagrum, flagellum	geisel
angwilla, scorpio	grimme geisel
ferula, virga, scutica	schuoler ruot
vibex	birck
ungula	marter krewel
lautumnum	martergerüft
eculeus	marterboon
crux, patibulum	galge
culleus	martersack
patricida, parricida	vattertoeder, lantzverrater

XXX.

De pertinentibus ad iudicia.

Iudex	richter
iudex ordinarius	mit recht erwelter richter
delegatus	dem etlich sach empholhen ist
subdelegatus	dem das underenpfolhen ist
officialis	official ader amptman
notarius	schriber
grossarius	grosschriber
advocatus, patronus	fürspreche
clientulus	der fur den der fursprech redet
iurista, iuris peritus	gelert in geistlichem recht
legista	gelert in weltlichem recht
actor	bekleger

[58] Edition by Wilhelm Wackernagel (Basel, 1847), pp. 33, 36.

reus	beklegter
testis	gezüg
sigillator, sigillifer	insigler
procuratorium	ein fürwesbrief
libellus	ein ansprachbrief

3. W. Brack's Vocabularius Rerum.[59]

Loca Penalia.

1	Quid carcer, eculeus, ergastulus sint	vide supra de publicis edificiis in fine
1a	[carcer	kercker a coercendo
1b	ergasculus	idem locus damnatorum
	eculeus	idem quod carcer, genus tormenti ad modum crucis]
2	cippus	ein dyepstock
3	cathena	ein ketten
4	pedica	ein zechlung oder ein fuesseysen oder dumelstock, aut a pede aut quasi podica, qui[a] pollucem allucem stringit
5	compes	fuossbandt, quia cum pede
6	columbar	ein halseysen
7	manica ferrea	handeysen, quia manum tenet
8	flagrum	geyssel
9	flagellum	idem; flagella teste Servio secundo Geor. dicuntur summe arborum partes a ventorum flatu. Et credo flagellum ideo dici cum ex hiis virgultis flagella fiunt
10	ferula	schuoler ruot, a feriendo, id est percutiendo dicta vel quia ex ferulis facta. Unde Virgilius in Bucc., Florentes ferulas et gradia lilia quassans
11	virga	ein rute, a vireo, -es, -ere
12	vibex	ein birck, vel inde virga dicitur
13	prealmarium vel palmiterium	quia palma, id est, manus scolarium cum hoc tangitur
14	crux	ein galg oder kreutze
15	patibulum	idem, a pacior, quia magna fit in ea passio
16	culleus	quasi claudius, ein folter oder ein tumelfesslin, quia in eis usque ad caput malefactores clauduntur.

Ad iudices spectantia.

1	iudex	richter, quasi ius dicens
2	iudex delegatus	dem etlich sach bevolhen sind
3	subdelegatus	unterrichter

[59] Editio Argentine, 1512.

4	arbiter	schidman, est enim iudex consensu utriusque partis
5	arbitrarius	idem
6	arbitrium	id est, voluntas wille
7	assessor	eins richters be[i]sitzer
8	vicarius	ein stathalter, quasi vicem tenens
9	officialis	amptman
10	iurisperitus	ein gerichtz weyser
11	legisperitus	gesatz erfarner. Quidam nolunt dicere legista, iurista, latinista, teste Vallensi Guarrino et ceteris grammaticis honoratis. Bene dicimus canonista, quia canon Grecum est. Sed nomina ista a Grecis et non a Latinis debent derivari
12	advocatus	rechtshelffer
13	patronus	beschyrmer, verweser
14	causidicus	reder, causam dicens
15	actor	clager
16	reus	schuldiger
17	testis	getzeug; deponere testes getzeugnus geben oder zeugen yn legen; negare testes, non admittere testes gezeugen verwerffen; appellare a testibus
18	sigillator	sigler
19	sigillifer	idem, quasi ferens sigillum
20	notarius	ein offenbar schreyber
21	examinator	vorhorer
22	commissarius	quia sibi causa committitur
23	litere excommunicationis	banbrieff
24	littere absolutionis	ban entlosung
25	littere interdicti	kirchenversclahbrieff, ut dum divina interdicuntur
26	litere in familie	que vadunt ad familias
27	litere reintrusionis	quasi renovationis priorum processuum
28	litere relaxationis	entschlahbrieff
29	sententie	urteylbrieff
30	appellatio	verwerffung, a sententia inferiori ad superiorem
31	litere recognitionis	bekantnuss oder vergichtbrieff
32	instrumentum	zeygbrieff
33	autentica	gelaubbrieff
34	copia	ein abgeschrifft
35	prothocollum	ein entworffen brieff
36	libellus	ein spruchbrieff
37	monitorium	ein warnungbrieff
38	citacio	ladbrieff

39	nuncius	ein botte
40	pedellus	ein waybel oder pedel
41	preco, -onis	buttel

Instrumenta legalia.

1	voluntas ultima	der letzt will
2	testamentum	ein testament, mentis testatio vel post monumentum, id est, mortem exprimitur in ipso testatoris voluntas
3	testamentacio	testamenti factio
4	testamentari	testamento aliquid legare
5	legatum	verschafft
6	legatio	verschaffung
7	legare	verschaffen am dotbette
8	olographum testamentum	quod totum manu testatoris est scriptum
9	irritum	unrecht oder irrig, quod non est rite factum
10	inofficiosum	quod exhereditatis sine naturali officio in alienas transfertur personas
11	suppressum	untergedruckt
12	ruptum	zerprochen, quod fit dum nascitur postumus, qui neque nomine exheres neque heres est institutus
13	codicillus	scriptura sine solennitate
14	fideicommissum	gelaublich bevelhnuss
15	pactum	fridsam uberkommung, quasi ex pace iactum
16	placitum	wolgefellich
17	mandatum	entphelnuss, quia olim fiebat datione manus, ideo mandatum dicitur
18	ratum	fast, quia ratione vel rite factum
19	cautio	versicherunge
20	emptio	emptoris actio, kauffung
21	venditio	verkauffung
22	locatio	leyberung, locantis actio
23	conductio	illius cui locatur
24	donatio	gebung, doni actio vel datio
25	stipulatio	
26	sponsio	gelubnuss
27	promissio	a promittendo.

VI. *Index of Manuscripts.*

Berlin, Preussische Staatsbibliothek
MS germ. fol. 1094 : n. 39

Danzig, Stadtbibliothek
MS 1834 : n. 34

Giessen, Universitätsbibliothek
MS 747 : n. 39

Görlitz, Stadtarchiv
MS Varia 4 : n. 34, 54

Leipzig, Universitätsbibliothek
MS 158 : n. 36
MS 1244 : n. 36
MS 1348 : n. 57
MS 1478 : n. 36
MS 1667 : n. 36

Liegnitz, Municipal Archives
MS Liegnitz Schöffensprüche (lost): n. 13, 18-20, 27

Mayence, Stadtbibliothek
MS 602 : n. 56

New York, Guido Kisch
MS Liegnitz Schöffensprüche: n. 13, 18-20, 27
MS Vocabula juris provincialis et feodalis : n. 51

New York, Union Theological Seminary Library
MS Vocabularius Latino-Teutonicus (1463) : n. 47

Przemysl, Poland, Municipal Archives
MS 284 : n. 51

Vienna, Nationalbibliothek
MS 12472 : n. 34

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Notes and Reviews

INDEX TITULORUM AUTHENTICI IN NOVEM COLLATIONES DIGESTI

Auctores medii aevi in utroque iure exinde a tempore glossatorum Novellis Iustiniani vix iam e Iuliani Epitome latina, sed potius ex illa saeculi sexti versione quae Authenticum audit usos esse omnibus constat viris litteratis. Cuius autem apud Bononienses compilatoris ope contigerit ut ex corpore CXXXIV novellarum in Authentico receptarum, resecatis inde XXXVII quae aut superfluae aut obsoletae videbantur, XCVII in novem redigerentur collationes, ad hanc diem nescitur. Atqui haec Authentici recensio vulgata evasit, ita ut ex tunc singula laudarentur novellarum capitula tali sermone, ut exemplo utamur: "Argumento in aut.(entico, -is) de nuptiis § ascriptitio coll. iiii." (pro Nov. 22,17, idest Auth. Coll. 4,1,17); dum alius obtinuit modus afferendi quod ad leges nonnullas quas ex Authentico depromptas et decurtatas duce Irnerio glossatores in Codicem Iustiniani inseruere quasque Authenticas vocabant, verbi gratia: "ut C. de sacrosanctis ecclesiis aut. quas actiones" (excerpta e Nov. 131,6, idest Auth. 9,6,6 post Cod. 1,2,23). Quarum initia et locos editio praebet Codicis a Kruegero parata in fine, p. 510 sqq.

Sed miro modo factum est ut editio Schoelliana corporis integri CLXVIII Novellarum Iustiniani indice rubricarum tam pro novellis graecis ipsis quam pro Authentico utriusque recensionis omnino careat. Hinc est cur quicumque de locis a scriptoribus medii aevi ex Authentico allatis certior vult fieri, ad indices veterum rariorumve editionum recurrere et quicquid ibi invenerit cum numeris Schoellianis debeat conferre. Quod sat incommodum esse nemo qui ipse aliquando huic institit rei negabit. Quapropter sociorum instantiae cedentes, ad usum maxime eorum qui iuris prudentiae mediae aetatis operam navant, indiculos qui sequuntur conscripsimus.

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4	(4)	4	5	(36)	34
5	(5)	5	6	(41)	39
6	(6)	6	7	(45)	44
2, 1	(7)	7	5, 1	(46)	46
2	(8)	8	2	(47)	48
3	(8J)	8J	3	(48)	47
4	(9)	9	4	(50)	51
5	(10)	10	5	(51)	52
6	(12)	12	6	(53)	53
3, 1	(14)	14	7	(54)	54
2	(15)	15	8	(55)	55
3	(16)	16	9	(56)	56
4	(17)	17	10	(57)	57
5	(18)	18	11	(58)	49
6	(19)	19	12	(59)	58
7	(20)	20	13	(61)	60
4, 1	(22)	22	14	(62)	61
			15	(66)	63

Auth. Coll.	(Const.)	Nov.
5, 16	(68)	66
17	(69)	67
18	(71)	71
19	(72)	70
20	(73)	69
6, 1	(74)	74
2	(75)	72
3	(76)	73
4	(77)	76
5	(78)	77
6	(79)	78
7	(80)	79
8	(81)	80
9	(82)	81
10	(83)	82
11	(84)	83
12	(85)	84
13	(86)	85
14	(88)	88
7, 1	(89)	89
2	(90)	90
3	(91)	92
4	(92)	94
5	(93)	91
6	(94)	95
7	(95)	96
8	(96)	97
9	(97)	99
10	(98)	100

Auth. Coll.	(Const.)	Nov.
8, 1	(99)	98
2	(100)	93
3	(102)	107
4	(103)	108
5	(104)	109
6	(105)	110
7	(106)	111
8	(107)	112
9	(108)	116
10	(109)	114
11	(110)	113
12	(111)	115
13	(112)	117
9, 1	(113)	118
2	(114)	119
3	(115)	120
4	(116)	125
5	(117)	124
6	(119)	131
7	(120)	127
8	(126)	159
9	(127)	134
10	(128)	86
11	(129)	106
12	(130)	132
13	(132)	143 = 150
14	(133)	128
15	(134)	123

Unde e CXXXIV constitutionibus Authentici XXXVII non esse receptas in collationes vulgatae recensionis facile vides, scil. 11. 13. 21. 24-33. 37-40. 42-44. 49. 52. 60. 63-65. 67. 70. 87. 101. 118. 121-125. 131. Quae manent XCVII in titulos XCVIII sunt distributae collationum, ubi (Coll. 2, 3) Iusiurandum const. 8 adnexum proprio titulo auctum esse perspicimus.

Tabula altera

Nov.	(Auth. Const.)	Coll.
1	(1)	1, 1
2	(2)	1, 2
3	(3)	1, 3
4	(4)	1, 4
5	(5)	1, 5
6	(6)	1, 6
7	(7)	2, 1
8	(8)	2, 2
8 Edictum	(8E)	2, 2
8 Notitia	(8N)	2, 2

Nov.	(Auth. Const.)	Coll.
8	Iusiur. (8J)	2,3
* 9	(9)	2,4
10	(10)	2,5
* 11	(11)	...
12	(12)	2,6
13	(13)	...
14	(14)	3,1
15	(15)	3,2
16	(16)	3,3
* 17	(17)	3,4
18	(18)	3,5
19	(19)	3,6
20	(20)	3,7
21	(21)	...
22	(22)	4,1
* 23	(23)	4,2
24	(24)	...
25	(25)	...
26	(26)	...
27	(27)	...
28	(28)	...
29	(29)	...
30	(30)	...
31	(31)	...
32	(..)	...
* 33	(35)	4,4
* 34	(36)	4,5
* 35	(37)	...
* 36	(38)	...
* 37	(39)	...
38	(40)	...
39	(41)	4,6
40	(42)	...
* 41	(..)	...
42	(43)	...
43	(44)	...
44	(45)	4,7
45	(52)	...
46	(46)	5,1
47	(48)	5,3
48	(47)	5,2
49	(58)	5,11
50	(49)	...
51	(50)	5,4
52	(51)	5,5
53	(53)	5,6
54	(54)	5,7

Nov.	(Auth. Const.)	Coll.
55	(55)	5,8
56	(56)	5,9
57	(57)	5,10
58	(59)	5,12
59	(60)	...
60	(61)	5,13
61	(62)	5,14
* 62	(64)	...
63	(66)	5,15
64	(65)	...
* 65	(67)	...
66	(68)	5,16
67	(69)	5,17
68	(70)	...
69	(73)	5,20
70	(72)	5,19
71	(71)	5,18
72	(75)	6,2
73	(76)	6,3
74	(74)	6,1
* 75 = 104	(63)	...
76	(77)	6,4
77	(78)	6,5
78	(79)	6,6
79	(80)	6,7
80	(81)	6,8
81	(82)	6,9
82	(83)	6,10
83	(84)	6,11
84	(85)	6,12
85	(86)	6,13
86	(128)	9,10
87	(87)	...
88	(88)	6,14
89	(89)	7,1
90	(90)	7,2
91	(93)	7,5
92	(91)	7,3
93	(100)	8,2
94	(92)	7,4
95	(94)	7,6
96	(95)	7,7
97	(96)	7,8
98	(99)	8,1
99	(97)	7,9
100	(98)	7,10
101	(101)	...

Nov.	(Auth. Const.)	Coll.
102	(32)	...
103	(33)	...
*104 = 75	cf. (63)	...
105	(34)	4,3
106	(129)	9,11
107	(102)	8,3
108	(103)	8,4
109	(104)	8,5
110	(105)	8,6
*111	(106)	8,7
112	(107)	8,8
113	(110)	8,11
*114	(109)	8,10
115	(111)	8,12
116	(108)	8,9
117	(112)	8,13
118	(113)	9,1
119	(114)	9,2
120	(115)	9,3
121	(...)	...
122	(...)	...
123	(134)	9,15
124	(117)	9,5
125	(116)	9,4
126	(...)	...
127	(120)	9,7
*128	(133)	9,14
129	(122)	...
130	(118)	...
131	(119)	9,6
132	(130)	9,12
133	(131)	...
134	(127)	9,9
135	(...)	...
136	(...)	...

Nov.	(Auth. Const.)	Coll.
137	(...)	...
138	(...)	...
139	(...)	...
140	(...)	...
141	(...)	...
142	(...)	...
*143 = 150	(132)	9,13
144	(...)	...
145	(123)	...
146	(124)	...
147	(125)	...
148	(...)	...
149	(...)	...
*150 = 143	cf. (132)	cf. 9,13
151	(...)	...
152	(...)	...
153	(...)	...
154	(...)	...
155	(...)	...
156	(...)	...
157	(...)	...
158	(...)	...
159	(126)	9,8
160	(...)	...
161	(...)	...
162	(...)	...
163	(...)	...
164	(...)	...
165	(...)	...
166	(...)	...
167	(...)	...
168	(...)	...
Edict. VIII	(121)	...

Asterisco in hac tabula signatae sunt novellae quas latine promulgavit ipse Iustinianus. Animadvertas autem Authenticum unam continere constitutionem, scil. 121, quae non extat in corpore CLXVIII Novellarum. At vero Nov.32 nihil aliud est nisi constitutionis latinae Nov.34 (Auth. const.36) versio graeca, dum Nov.75 (Auth. const.63) iteratur in Nov.104, sicut et Nov.143 (Auth. const.132) in Nov.150. Demum Nov.41 deperdita est, cuius argumentum latinum praebet Iuliani Epitome in const.38, graecum vero dant Epitomae tam Theodori (const.41) quam Athanasii (4,12),

cum Novellarum nonnulli codices graeci hoc in loco perperam inserant exemplar Nov.50. Quae si omnia perpendis, e corpore Novellarum quod hodie habemus non iam XXXV sed XXXI tantum constitutiones in Authentico dices desiderari, scil. (demptis Nov. 32. 41. 104. 150) Nov. 121-122. 126. 135-142. 144. 148-149. 151-158. 160-168, in collationibus autem LXVII, scil. praeter illas etiam Nov. 11. 13. 21. 24-31. 35-38. 40. 42-43. 45. 50. 59. 62. 64-65. 68. 75. 87. 101-103. 129-130. 133. 145-147.

Jordani de Saxonia Ordinis Eremitarum S. Augustini Liber Vitasfratrum. Ad fidem codicum recensuerunt, prolegomenis, apparatu critico, notis instruxerunt Rudolphus Arbesmann, O.S.A., Ph.D. et Winfridus Hümpfner, O.S.A., S.Th.D. New York: Cosmopolitan Science & Art Service Co., 1943. xcii + 548 pp. $7.50.

Among the scholastic pursuits of a religious Order, the inquiry into the lives of earlier generations of brethren fulfils both an historical and a spiritual function: the quest for certitude about the beginnings and the unfolding of the institute brings forth at the same time spiritual nourishment in that the exemplary and saintly lives of the past spur him who reads or listens to greater perseverance in the professed way of perfection. When the Austin Friar, Jordan of Saxony, set out to write his *Vitasfratrum* (completed by 1357) he wished to give his Order a book comparable to that which the Dominicans possessed in the Lives of the Brethren by Gerald of Frachet:

> ". . . that the examples of saintly religion set by the Fathers and the Brethren of earlier times may not become shrouded in oblivion but firmly moored in lasting memory, for this reason I have endeavored to collect what knowledge has come down to me of the life and deeds of the Fathers and Friars who were men of singular accomplishments and noteworthy merits in this Order, and therewith to describe the origin and progress of the Order and its common observances, as far as God gave it to me . . ." (Prologue, 8-15),

that is, to compose a historical treatise with an ascetic purpose:

> "This humble book I should prefer to call *Vitasfratrum,* for one, because in it the life of the Brethren is described, and also because in reading it any friar will be enabled to know from his own life whether he is a true son of our Father St. Augustine and thus a true brother of his Order . . ." (Epistle, 20-3); ". . . that from the deeds of the departed I beget the edification of those to come." (Prologue, 30-1).

He did not choose the form of a chronological account, for he not only knew that the spiritual life of so many saintly men is hidden away from mortal eyes (Prol. 21-6), but also wisely recognized that History fails to reveal a bond of continuity by which the early monastic foundations of St. Augustine could be directly linked to the various groups of Hermits whom the Pontiffs of the thirteenth century gradually united under the Augustinian Rule (I, 14).

Thus Jordan found that he would better accomplish his task by writing, instead of a chronicle, a running commentary, as it were, to the Rule and the Constitutions—a "timeless" commentary in which reflexion, explanation and admonition are interwoven with countless *exempla* drawn from the lives of the Desert Fathers as well as of his own brethren, and with significant events from the history of the Order itself.[1]

The book is divided into four parts, according to the fourfold *communio* expressed in the Rule: *communio localis habitationis— spiritualis unionis — temporalis possessionis — proportionalis distributionis.* Consequently, the first part treats of the basic forms of religious life, of anchoretic and cenobitic monachism and of the manner in which both are blended in the Augustinian institute. The second and longest part (over one half of the book) is devoted the "inner life" of the Order, to its constitutional pattern, properties and fundamental laws, to the ascetic virtues, ideals and contents of religious life, and to the activities of the brethren. The third consists of a treatise on poverty—to establish the stand of his Order in the ardent discussions that were raging in his day on monastic and mendicant poverty had been of serious concern to Jordan (cf. his dedicatory Epistle and Fr. Hümpfner's introduction, p. liv ff.)— and the fourth part, finally, regards the common use of material things and related disciplinary rules.

In working out the parts of this vast program, Jordan shows himself well read in ancient and medieval authors (though many of his classical and patristic citations come from second-hand sources[2]); a trained canonist (especially in book III); not averse at times to scholastic reasoning (cf. e.g. I, cc. 4, 5, 6; 10, 11, 12; III, cc. 5, 6, 7, etc.); a sober historian, whose only serious mistake is the belief in the genuineness of certain pseudo-Augustinian writings,[3] but whose work is certainly indispensable as a source for

[1] Main topics of historical interest are: (pt. I) St. Augustine and the religious life; Johannes Bonus and his Hermits; the dispersion and union of the Order; papal privileges for the Hermits; the translation to Pavia of St. Augustine's body; (pt. II) history of the Rules and the Constitutions; theologians and writers of the Order; (pt. III) history of the forms of ecclesiastical property, and of the property of Regulars.

[2] The large part held in this regard by canonical collections, especially by the *Decretum Gratiani,* is duly noted by the editors in the Introduction, p. l, and in the historical apparatus; cf. e.g. p. 4, 39-45, etc.

[3] In particular the spurious *Sermones ad fratres in eremo,* cf. p. lxxv f. New

the first century of the Order after the great union.

Above all, however, it was Jordan's outstanding achievement as an ascetical theologian and his unfathomable wealth in edifying *exempla* which determined, in 1571, the Superiors of the Order to include the *Vitasfratrum* among the books prescribed for reading at the dinner table, the "living" commentary on the Rule thus being substituted for Hugo of St. Victor's *Expositio*. Thereupon, the Vicar General Agostino Fivizzani published in 1585 an Italian translation, *Del viver dei Frati,* and two years later, an edition of the Latin original from three manuscripts. This remained, except for a reprint issued under false pretenses at Liége, 1625, the only printed text until the appearance of the first critical edition, presently reviewed.

The editors of the impressive volume are to be congratulated on the excellent result of their unsparing labors and all-round scholarship. As we learn from the preface, Father Hümpfner is responsible for the Introduction, the tracing of the manuscripts, and the historical annotations on pp. 445-81, while Father Arbesmann has done the collating of the manuscripts, worked out the critical apparatus, and traced the source material used by Jordan. The work of the two scholars will stand as a model edition that has mastered in full both the historical and the philological intricacies with which medieval texts of this kind are so abundantly beset.

In the Introduction, Father Hümpfner studies the life and the literary oeuvre of Jordan with a thoroughness surpassing by far the work, and eliminating many inveterate errors of older bibliographers. A wealth of new data, painstakingly gathered from printed and numerous unprinted sources, and regarding Jordan himself as well as many other personalities and facts of Augustinian history is proffered in this treatise and further enlarged in the historical *annotationes* to the *Vitasfratrum*. Concerning one of Jordan's early writings, the *Vita sancti Augustini,* and the influence it exerted on John Capgrave's Life of Saint Augustine, the reader will

evidence on the true author of these sermons is promised by Hümpfner, p. xxix. Furthermore, Jordan labels as coming from the (pseudo-Augustinian) *Manuale* or *Speculum* certain prayers from Pseudo-Alcuin's *Confessio fidei,* cf. pp. 43; 227-33. On Jordan's otherwise remarkable critical gifts see pp. lxxiv ff.

now consult for details Father Arbesmann's article[4] in *Traditio*, I (1943), 341-53, which expands a brief statement to this effect made on p. xxv, n. 3. As to the *Vitasfratrum* itself, Father Hümpfner gives a circumstantial account of the origin of the book, of its literary sources, and its submission to the Prior General, Gregory of Rimini, who did not approve, however, of some of Jordan's conclusions in the controversial matters of poverty and property.

There follows a description of the manuscripts, with thirteen complete copies and four fragments listed. To the reviewer's knowledge, only one manuscript has been overlooked, to wit, MS *theol. lat. q.* 257 (membr. s. XV) of the State Library in Berlin, as cited in E. Seckel, *Beiträge zur Geschichte beider Rechte im Mittelalter* (Tübingen, 1898), p. 503.—It is noteworthy that the manuscript tradition is entirely restricted to Germany, the Netherlands, and Italy. The great Augustinian houses of France, Spain and England appear to have been unaware of Jordan's work. The critical study of the extant manuscripts results in a stemma in which two main branches are distinct. The Italian group is characterized, above all, by the omission of a formula which Jordan proposed (III, 13) for the renunciation of private property on the part of the friar, and the concession to him of custody and *usus* on the part of the Superior—this formula being suppressed, as Hümpfner convincingly suggests, by a censor of the Order in consequence of the General's attitude. A sub-family of the Italian group resulted from a further *recensio* which entailed, among other marks of censorship, a substantial addition to Jordan's catalogue of Augustinian theologians. The manuscripts of the German group, on the other hand, present a text of their own in the chapter treating of the history of St. Augustine's Rule, or Rules (II, 14); in this, they witness the only change made by Jordan himself after he had submitted his work to the General in 1357.[5]—The printed editions and transla-

[4] By a curious coincidence, the same discovery regarding John Capgrave and Jordan was made, independently from Arbesmann and at about the same time, by G. Sanderlin, "John Capgrave Speaks up for the Hermits," *Speculum*, XVIII (1943), 358.

[5] Cf. pp. lvi, lxxvii.—The text on p. lvi: "He seems to have waited . . ., keeping his work in abeyance, and never to have touched it again," with the modifying footnote 29: "Except the change of his opinion . . .," is not too happily formulated.

tions are studied next, and finally the significance of the *Vitasfratrum* is treated at length. Father Hümpfner seizes this opportunity to discuss the three most disputed points in Augustinian history—since also Jordan touched upon them—: *viz.* the authenticity and interrelation of the various Rules going under the name of St. Augustine; the Saint's intentions as to founding a monastic Order; and the continuity of Augustinian monachism through the early Middle Ages.

We cannot dwell here upon the very interesting data offered with regard to the latter two topics,[6] but we have to report on the momentous conclusions reached in Hümpfner's study of the Rules.[7] (1) For the so-called *Regula consensoria,* beg. "Communi definitione decrevimus"—certainly not a work of St. Augustine, as already Jordan saw on second thoughts and as all scholars are now agreed—he suggests against De Bruyne, who asserted a Priscillianist origin, the authorship of St. Fructuosus. (2) As to the so-called *Regula secunda,* beg. "Ante omnia fratres carissimi," which traditionally has been denied, since the sixteenth century, Augustinian authorship, Hümpfner reverses his earlier position[8] and adopts Mandonnet's[9] recent sensational vindication of this text as the genuine first Rule written by St. Augustine for the monastery at Tagaste, in 388. (3) The so-called *Regula ad servos dei,* beg. "Haec sunt quae observetis," is according to Mandonnet and Hümpfner an authentic supplement to, and commentary on, the first Rule and not, as the earlier prevailing opinion would have it, a spurious adaptation of St. Augustine's Rule for nuns, contained in his 211th Epistle. It is rather the authenticity of *ep.* 211 which (cf. p. lxxx, n. 79) should now be rejected.

A definite appraisal of this new theory will have to await the publication of Father Hümpfner's promised separate study on the three texts and their transmission, the results of which are anticipated in the new critical edition of the Rules as Appendices A, B

[6] However, the reader would welcome evidence more substantial than the authority of the seventeenth-century writer, Christian Lupus, for the statement that "at least nineteen monasteries were founded during St. Augustine's lifetime" (p. lxxxi).

[7] Pp. lxxvi-lxxx; also *Annot.* pp. 464-6; 477.

[8] *Lexikon für Theologie und Kirche,* s. v. "Augustinerregel."

[9] *Saint Dominique* (Paris, 1938), II, 101 ff.

and C to Jordan's book (pp. 484-504). No doubt we may expect from this forthcoming article a thorough discussion of the criticisms leveled at Mandonnet's thesis, as well as of the principles underlying the selection of manuscripts in the new edition. One question only will be raised at present. It concerns the inscriptions and the nomenclature of the three Rules. In Appendix A, the title: *S. Fructuosi decretum observantiae regularis, alias Regula consensoria* appears as part of the text [10] without manuscript evidence offered in the apparatus. At least the first part (*S. Fructuosi . . . regularis*), which is admittedly conjectural, should have been enclosed in brackets (as it is done in Append. B and C with regard to the titles, *Regula sancti Augustini prima* and *secunda* respectively), all the more so since the name, *Decretum observantiae regularis* is based on no other grounds than an arbitrary suggestion by Jordan (p. 170, 144: ". . . censui appellandum"). With the same right, the Rule "Haec sunt" (Append. C) would then have required the rubric, *Speculum*.[11] As to the Rule "Ante omnia" (Append. B), the adoption of Mandonnet's designation, *Disciplina monasterii* — again without brackets as if belonging to the text — is open to objections. It lacks any transcriptional reason (while Mandonnet's rejection of the rubric in MS Laon 328*bis*, *Incipit de ordine monasterii*, is not convincing) and is not supported by intrinsic evidence. The text contains twice, it is true, the words, *disciplina monasterii*, but certainly not as references to the Rule itself, and not even with the same meaning in the two passages:

> (c. 8) . . . Nemo extra monasterium sine praecepto manducet neque bibat, non enim hoc ad disciplinam pertinet monasterii.
>
> (c. 10) . . . semel atque iterum commonitus, si non emendaverit, sciet se subiacere disciplinae monasterii sicut oportet.

In c. 8 the words are used to indicate that eating and drinking outside the monastery is contrary to monastic "discipline" in general (". . . for this does not befit the discipline of a monastery"); in c. 10, to determine the "disciplinary" (= punishing) power of the Superior after two reproofs (cf. Mt. xviii, 15; *Vitasfr.* II, 10) of the culprit.

[10] The title is computed in the numeration of lines of the text (p. 485; there is, however, a mistake in counting: the first line of text should be numbered 4, not 6), differently from the title of Jordan's book and the inscription of the *Epistula* (p. 1), which are not included in the reckoning of lines.

[11] Cf. *Vitasfr.* p. 171, lines 174 and 190, also the critical apparatus, p. 494, 1.

In connection with the foregoing observations, the problem of the original title of Jordan's work must also be touched upon. The editors chose *Liber Vitasfratrum* for the reason that " in Jordanus's opinion, '*Vitas*' is a genitive singular, such as is found in the compound '*paterfamilias*'. . ." (p. xlvii). The description of manuscripts (pp. lvii ff.) and the critical apparatus on p. 1 are silent about rubrics or incipits of the manuscripts, and only the colophon of the inferior sister-manuscripts Pavia 579 and Rome, Angelica 1108 could be cited in support of *Liber Vitasfratrum.*[12] But Jordan himself expressly speaks of his book merely as *Vitasfratrum,*[13] even as he refers to the Lives of the Desert Fathers (which he considers as a work of St. Jerome) always as *Vitaspatrum,*[14] never as *Liber Vitaspatrum.* The passages, " est enim nomen compositum ex duobus obliquis et ideo manet indeclinabile " and " secus de nominibus compositis ex uno recto et altero obliquo sicut paterfamilias " (p. 5, 66-6, 70-1) do not justify the inference that Jordan considers the oblique case *vitas-* as a genitive like *-familias.* The plain title *Vitasfratrum* therefore seems preferable.

[12] Cf. p. lix: " Explicit liber vitasfratrum editus et compilatus per reverendum virum fratrem Jordanum " *rell.* (This *explicit* also in MS. Rome, Angelica 1128, which has, however, no independent value, being a copy of Pavia 579). On the inferior quality of the two MSS. see p. lxiv ff.—The subscriptions of MS. Kiel *Bord.* 10 (" In die beati Blasii finitus est praesens liber Vitasfratrum anno quo supra ") and MS. Utrecht 241 (" Liber iste scil. Vitasfratrum heremitarum sancti Augustini pertinet regularibus in traiecto " *rell.*) are not to the point, since in both cases *liber* refers only to the individual copy. On the other hand, the in- or subscriptions of the three fragments, Bamberg B. IV. 35 (" Quae omnia excerpta sunt de secundo libro intitulato Vitasfratrum " *rell.*), Antwerp, Plantin-Mor. *lat.* 166 (" Jordanus parte secunda capitulo xiiii. vita<s?> fratrum heremitarum "—thus the catalogue; slightly different in Hümpfner, p. lx), and Copenhagen *Gl. kgl. S.* 85 (" Excerptum vitas fratrum per magistrum Jordanum ") clearly consider *Vitasfratrum* the original title.

[13] *Epistula,* p. 2, 20; the passage of the prologue, p. 5, 65: " quod hic li ' Vitasfratrum ' stat pro una dictione . . ." cannot be adduced as counter-evidence: *li* has the function of an article (*τό*); cf. p. 61, 47-9: " quod in hoc titulo (*scil.* of the Order) li *Ordinis* non debet immediate poni . . . sed poni et referri debet ad li *Eremitarum,*"—a passage which forbids to read *li* as *liber.*

[14] Cf. p. 4, 32: ". . . quae beatus Hieronymus in libro, qui Vitaspatrum inscribitur, narrat . . .;" p. 5, 65-6: ". . . sicut et ' Vitaspatrum,' qui est liber beati Hieronymi;" and so forth throughout the book.

To come now to Father Arbesmann's edition of the text, only few and inadequate words of praise can here be said. Whoever has had to deal with medieval texts knows how often the editor is faced with a highly complex tradition in which no manuscript, or group of manuscripts, offers a sufficiently reliable set of readings. Precisely this is the situation Father Arbesmann had to cope with in the case of Jordan. It required the utmost philological skill and a penetrating yet conservative textual criticism to establish a safe text from the diverse material on hand. The task has been brilliantly solved and the present edition may safely be presumed to come as close as humanly possible to Jordan's lost original. Beyond the apparatus of variant readings, Arbesmann presents us with an analytical apparatus in which, with an ubiquitous erudition, the overabundant wealth of quotations and references in the text (c. 1,800 in number) are verified. The reader will be grateful for the added *Index auctorum citatorum* in which all these citations are listed in detail. A good bibliography and general index make the conclusion of the volume. The splendid typographical presentation gives high credit to the publishing house.

To the editors' own list of corrections, we may be allowed to contribute a few minor *addenda et corrigenda.*—p. x and *passim:* the siglum *RF* for Friedberg's edition of the *Corpus Iuris Canonici* should give way to *F,* for Friedberg alone was the author of the *Editio Lipsiensis secunda* which entirely departs from Richter's *Ed. Lips. prima.*—pp. xxiii, lvi, 476: *Hermann* (*de*) *Schilditz* corr. *Hermann of Schildesche,* thus named after his birth-place in Westphalia, as shown by Seckel, *Beiträge zur Geschichte beider Rechte* (cf. *supra*), whose outstanding contribution (pp. 129-221; 503 ff.) to Hermann's biography, and in particular to his *Introductorium iuris,* is overlooked.[15]

Pp. lvii-lxi (description of MSS): Wolfenbüttel, *Ducal Library* corr. *State Library* (*Landesbibliothek*).—*Liège* corr. *Liége* (slight French misspellings also pp. xii, n. 11; xxiv: *manuscript*(*s*) corr. *manuscrit*(*s*); p. xliii, n. 4: *Departements* corr. *Départements*).—

[15] Incidentally, a comparison of Jordan's paragraph on Hermann with other catalogues of the latter's writings and with the rubrics of two MSS cited by Hümpfner, p. 476, suggests that *Vitasfr.* p. 241, 1: "Item Opus quadragesimale de mansionibus et plura alia incompleta" may originally have read: "Item Opus xl^{e} <. Item tractatum> de <xl.> mansionibus" *rell.* and that the present state of the text is due to haplography in the archetype.

Bamberg, *Municipal Library B. IV. 35* corr. *State Library, MS Patr. 104 (B. IV. 35)*; (also p. xlvi, n. 11: *MS Q. V. 54 of the Bamberg Munic. Libr.* corr. *MS Theol. 135 [Q. V. 54] of the Bamberg State Libr.*)—Antwerp, *Museum Plautin-Moretus . . . fol. 273* corr. *Museum Plantin-Moretus . . . fol. 213.*—Oxford, Bodleian Library, *C. 850* corr. *MS Rawlinson C. 850* (further minor inconsistencies and anachronisms in regard to names of libraries and manuscript collections also pp. xxxvi, nn. 8-17; xl, n. 7, xliii, n. 6; xlvi, n. 11. Also p. xxxvii, n. 19: British Museum, *MS 27,913* corr. *MS Add. 27,913;* p. lv, n. 27: *MS Vaticana Chisiana 442* corr. *Cod. Ms. Vaticanus Chisianus 442* or *MS Chigi 442 of the Vatican Library* [number correct? the class-marks of the *Codd. Chis.* consist of letters and figures]).—p. lxviii: the imprint of the *editio princeps* should have been given, as it is done for Sabothius' reprint and Fivizzani's translation.

P. 7 and *passim:* the chapters of Jordan's book should be inscribed, in compliance with medieval usage and with Jordan's own cross-references (cf. pp. 20, 83; 21, 26; 32, 68; 49, 38, etc.), not as *caput* I, II, etc. but *capitulum* I, II, etc.— pp. 93 and 519: Guido de Baysio, *Super Sexto Decretorum* corr. *Super Sexto Decretalium.* —pp. 214, 291, 356 and 522: *Walafridus Strabo* should not be given as author of the *glossa ordinaria* on the Scriptures; cf. Beryl Smalley, *The Study of the Bible in the Middle Ages* (Oxford, 1941), p. 40: ". . . a bibliographical legend" which "dies hard."— p. 267: for the MSS of Robert Grosseteste's Commentary on Pseudo-Dionysius Areopagita see now S. H. Thomson, *The Writings of Robert Grosseteste* (Cambridge, 1940), pp. 55, 78.—pp. 300 and 520: *Henricus de Segusia* corr. *Henricus de Segusio* (ital. Susa, lat. Segusium).—p. 520: Innocentius III, *Reg.* I, ep. 432 should not be listed among the *Scriptores medii aevi* but under the *Fontes iuris,* p. 522 ff. (= *Decretal. Greg. IX.* V, 32, 2; cf. p. 430). On the other hand, the *Brocarda Damasi* (p. 522) belong under the *Scriptores,* and not the *Fontes.*[16]—p. 522: two manuscripts, *Codex Ms. Palatinus Lat.*

[16] Whether Jordan knew the *Brocarda* by Master Damasus the Hungarian in their original form (as Arbesmann's reference to the MS Rome, Casanatense 1910, seems to suggest), is very doubtful. Collections of *Generalia* or *Brocarda iuris* wherefrom Jordan might have drawn his legal maxims (pp. 65, 336) were abounding in the fourteenth century; if he had recourse to this particular work at all, he certainly used it in its second edition as revised by Bartholomew of Brescia (cited only as secondary reference by Arbesmann),

500 and *Codex Verodunensis 41* have slipped by mistake in the index of *Fontes iuris* behind the lemma *Codex Iustinianus;* their only legitimate place would be in an *Index codicum manuscriptorum* which we sadly miss in a volume otherwise so splendidly fitted with indices.—p. 523: *Decretalia Gregorii IX* corr. *Decretales* (*scil. epistulae*) *Greg. IX.*—p. 524: *Sexti Decretalia* corr. (*Liber*) *Sextus decretalium.*

But such minor blemishes cannot impair the scholarly value of the work. To all intents, the editors deserve our tribute of praise for having made accessible to the modern student this signal document of spiritual life in the Middle Ages—which has become, by their noble efforts, no less imposing a document of their own acumen and learning.

STEPHAN KUTTNER

THE CATHOLIC UNIVERSITY OF AMERICA.

The Editors have received the recent book by Raphael Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri, 332 B. C.-640 A. D.* (New York: Herald Square Press, 1944. Pp. xv + 488. $12.50). In the imposing volume, the eminent exiled Polish scholar presents the results of his forty years of painstaking research and unique experience in the field of juridical papyrology, molded in a comprehensive, systematical treatise on the private, penal, and procedural law of Egypt from the Ptolemies to Byzantine times, and as based on the historical evidence of well-nigh three and a half thousand legal papyri. While at present congratulating Professor Taubenschlag on the auspicious publication of his *magnum opus,* the Editors of this magazine will provide for a detailed critical account by a competent reviewer in next year's issue.

From England, the Editors received the recent book, *Introduction to Greek Legal Science,* by the late lamented Professor George M. Calhoun of the University of California. The posthumous manuscript was composed to become a chapter in *The Oxford History of Legal Science,* a co-operative project planned and directed by Hermann Kantorowicz and Francis de Zulueta which lately had to be abandoned, owing to the death of Dr. Kantorowicz and the difficulties of the times. Calhoun's almost finished contribution has now been edited by Professor de Zulueta, with the addition of a few footnotes and some bibliography and published as a separate volume (Oxford: At the Clarendon Press, 1944. Pp. viii + 86. 5*s.* 6*d.*). The lucid and succinct

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or even in yet another version (on which see Kuttner, *Repertorium der Kanonistik,* Città del Vaticano, 1937, p. 421). By this time, Damasus' original was no longer circulated.

account of the development of Greek legal thought by one of its foremost contemporary students, whose death is a great loss to classical and legal learning, thus fortunately has not been allowed to perish. A competent review will be published in next year's issue.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

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